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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

CASE-SWAYNE CO., INC., *Petitioner,*

v.

SUNKIST GROWERS, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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IN THE

SUPREME COURT OF THE UNITED STATES

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No.

CASE-SWAYNE CO., INC., *Petitioner,*

v.

SUNKIST GROWERS, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Case-Swayne Co., Inc., petitions for a writ of certiorari to review so much of the decision of the United States Court of Appeals for the Ninth Circuit entered in this case November 21, 1966, as holds that Sunkist Growers, Inc., is a co-operative organized in compliance with section 1 of the Capper-Volstead Act (as to which part of said decision a dissenting opinion was filed).

Opinions Below

The majority and dissenting opinions of the Court of Appeals (App. A, *infra,* pp. 19-44) are reported at 369 F. 2d 449. The District Court's Pre-Trial Order No. 1, dated April 22, 1964, involving the issue here presented, (App. B, *infra,* pp. 45-48) is unreported. Memorandum and Order Granting Motion For Directed Verdict (App. C, *infra,* pp. 49-57) is unreported.

Jurisdiction

The decision of the Court of Appeals was entered on November 21, 1966. On December 16, 1966, petitioner filed a timely petition for rehearing pursuant to Rule 23 of the Rules of the Court of Appeals for the Ninth Circuit. On December 22, 1966, Sunkist Growers, Inc. (hereinafter referred to as Sunkist) filed a petition for rehearing. On January 12, 1967, both of said petitions were denied by the Court of Appeals. We invoke the jurisdiction of the Supreme Court under 28 U.S.C. 2101 (c).

Statute Involved

Section 1 of the Capper-Volstead Act (7 U.S.C. 291) in pertinent part provides:

> "Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes . . . ."

Question Presented

Whether the majority of the Court of Appeals erred in holding that an incorporated association is duly organized under section 1 of the Capper-Volstead Act notwithstanding that approximately 15% of the association's members are not producers of agricultural products and not associations organized under said section but are profit making corporations.

Statement

Jurisdiction of the District Court was based on sections 1 and 2 of the Sherman Act and section 4 of the Clayton Act (15 U.S.C. 1, 2, and 15). (Complaint, Cl. Tr. 1-13).

On April 15, 1958, petitioner filed its complaint against Sunkist; the Exchange Orange Products Co. (hereinafter referred to as Exchange Orange) and Exchange Lemon Products Co. (hereinafter referred to as Exchange Lemon), alleging in part that these parties had combined and entered into contracts and conspired to restrain trade and have monopolized and attempted to monopolize the trade in product oranges grown in California and Arizona in violation of sections 1 and 2 of the Sherman Act, alleging damages in the sum of $800,000.00 and praying that the damages be trebled pursuant to section 4 of the Clayton Act (Cl. tr. 1-13).

On July 21, 1958, Sunkist, Exchange Orange and Exchange Lemon answered the complaint and (as relevant to this petition) alleged the affirmative defense that they were agricultural associations meeting the requirements of section 6 of the Clayton Act.[1] (15 U.S.C. 17) and section 1 of the Capper-Volstead Act (Cl. Tr. 155-170).

On October 31, 1958, Exchange Orange and Exchange Lemon merged into Sunkist. Sunkist assumed all the obligations of the merged corporations and pursuant to motion of Sunkist, Exchange Orange and Exchange Lemon were dismissed from the action (Cl. Tr. 222-229; 611-12; Pl's Exh. 1A).

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[1] The Capper-Volstead Act made the provisions of section 6 of the Clayton Act applicable to "associations" such as Sunkist, Exchange Orange and Exchange Lemon having capital stock. The issues raised by section 6 of the Clayton Act have been deemed embraced within the issues raised by the Capper-Volstead defense. *United States* v. *Borden Co.*, 308 U.S. 188 (1939); *Maryland & Virginia Milk Producers Ass'n, Inc.* v. *United States*, 362 U.S. 458 (1960).

In April, 1961, the parties presented to the Court a stipulation of facts relating to the defense of section 1 of the Capper-Volstead Act, hereinafter referred to as the Capper-Volstead stipulation. The stipulation was filed October 27, 1964 (Cl. Tr. 1790-1804).

On June 29, 1962, petitioner filed a supplemental complaint pleading transactions occurring since the date of the original complaint and alleging additional damages from April 15, 1959 to January 31, 1962, in the sum of $1,412,000 (Cl. Tr. 1078-1083).

At a hearing, March 2, 1964, the parties stipulated that the facts as stipulated to in the Capper-Volstead stipulation were in all material respects the same except for the merger of Exchange Orange and Exchange Lemon into Sunkist (October 31, 1958) and applied to the entire period of the action (Cl. Tr. Vol. A, 25A-26A).

On April 23, 1964, the Court signed Pre-Trial Order No. 1. The District Court ruled therein that Sunkist, Exchange Orange and Exchange Lemon had complied with section 1 of the Capper-Volstead Act, and consequently a conspiracy in violation of the Sherman Act could not exist solely between Sunkist, Exchange Orange and Exchange Lemon, and ordered two separate trials, the first to cover the issue of liability and, if the petitioner prevailed, the second to cover the issue of damages. (App. B, *infra*, pp. 45-48, Cl. Tr. 1307-1310). On May 26, 1964, in pretrial order No. 2, the Court ordered the issues in the action confined to whether Sunkist had a monopoly on oranges grown in California and Arizona, whether it had illegally used such monopoly power or had attempted to monopolize such oranges, and damages (Cl. Tr. 1359-60).

Exchange Orange was a 100 percent owned subsidiary of Sunkist. Exchange Lemon's membership was composed the same as Sunkist's membership. (Paragraphs 7 and 8

Capper-Volstead Stipulation, Cl. Tr. 1794-1795. See also the Supreme Court's decision in *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 370 U.S. 19 at p. 22, hereinafter referred to as the *Winckler* case.) Thus, Exchange Orange and Exchange Lemon would fall with Sunkist. Therefore, in further discussion of the membership requirements of an association under section 1 of the Capper-Volstead Act we refer only to the composition of Sunkist's membership.

Trial was had. Sunkist, without offering evidence, moved for a directed verdict. On March 2, 1965, a final judgment was entered pursuant to the Court's "Memorandum and Order Granting Motion For Directed Verdict" (App. C, *infra*, pp. 49-57. 5 Cl. Tr. 1964-1966; 2093-2104; 2110-11).

On November 21, 1966, the Court of Appeals reversed the judgment of the District Court and held that petitioner had made a prima facie case for the jury that Sunkist had wrongfully exercised monopoly power and had intentionally attempted to monopolize the trade in product oranges in the California-Arizona market. *But*, one judge dissenting, the Court of Appeals held that the District Court had correctly ruled that Sunkist had complied with section 1 of the Capper-Volstead Act, the issue we are here concerned with. (App. A, *infra*, pp. 19-44).

The facts relevant to the Capper-Volstead issue are as follows:

Sunkist obtained 95.28 percent of its fruit from its citrus packing house members hereinafter referred to as packing houses. The fruit *growers* were not Sunkist members except for certain "corporate growers" who had sufficient volume to operate their own packing houses and who supplied the remaining 4.72 percent of fruit handled by Sunkist (Para. 3, Capper-Volstead Stip. Cl. Tr. 1793).

The packing houses we are here concerned with are those

denominated "*agency associations*" in the Capper-Volstead stipulation (See para. 4, Capper-Volstead Stip. Cl. Tr. 1793-1794).

To prevent confusion it should be kept in mind that Sunkist in its 1955 Sunkist-District Exchange-Association Agreement with the packing houses (Exh. A to Capper-Volstead Agreement, Cl. Tr. 1805-1820) and in its Amended Articles of Incorporation and By-laws after the October 31, 1958 merger (Plf's Exh. 1A) refers to the packing houses collectively as "associations" even though the so-called "*agency associations*" (the packing houses we are concerned with) are *not* fruit growers, *not* associations of growers, but profit-making enterprises.

When this suit was filed (April 15, 1958) and until October 31, 1958, the packing houses derived their Sunkist membership from their association with District Exchanges (Paragraphs 5 and 6 Capper-Volstead Stip. Cl. Tr. 1794; Article XII, Sunkist's Articles of Incorporation Cl. Tr. 1837; opening paragraph and paragraph 2 Exh. A to Capper-Volstead stipulation Cl. Tr. 1807. See also the *Winckler* case, 370 U.S. at p. 21). After the merger of October 31, 1958, the packing houses were *specifically designated members* of Sunkist (Article 2.2, p. 4 "Sunkist's Amended Articles of Incorporation and By-Laws", Plf's Exh. 1A).

The function of the packing houses in the Sunkist system was to enter into agreements with growers for delivery of grower's fruit to the packing houses, pick the fruit (after the grower had brought it to the point where it is ready to pick), wash, grade, and market it through Sunkist (Capper-Volstead Stip. Cl. Tr. 1799: 22-27; para. 23 of Exh. A. to the Stip. Cl. Tr. 1813 (the 1955 Sunkist-District Exchange Association Agreement, page 9); Article 2.3 p. 4 "Sunkist's Amended Articles of Incorporation and By-Laws", Plf's Exh. 1A).

The "make-up" of Sunkist's agency "association" members was stipulated to in paragraph 4 of the Capper-Volstead Stip. (Cl. Tr. 1793: 22-27)"

> "4. *Agency Associations.* Agency associations constitute 14.91% by number and 12.94% by volume of all associations in the Sunkist system. The agency association is normally a private corporation which owns and operates packing house facilities. Some "agency associations" are individually owned enterprises and partnerships . . . Such agency associations do not qualify as, nor do they claim to be, cooperative associations under section 1 of the Capper-Volstead Act."

The "agency associations" are not fruit growers. They purchase the oranges they market through Sunkist from growers for the consideration of "cost plus a fixed fee" per box of oranges. Hence, the agency association does not itself participate in either gain or loss involved in marketing through Sunkist beyond the recovery of its costs and fixed fee for marketing (Capper-Volstead Stip. Cl. Tr. 1793-1794; Exh. B to said stipulation which is "a contract between such an agency association and its growers which may be deemed as typical of such associations", Cl. Tr. 1793-1794; 1821-1822).

Reasons for Granting the Writ

I

The issue of whether the membership of a cooperative[2] must be "farmers" or (as pertinent to the instant case) "fruit growers" or associations composed of fruit growers, we believe to be one of original impression. We do not believe it has ever before been questioned but that the pro-

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[2] Hereinafter we use the term "cooperative" as referring to an association organized in compliance with Sec. 1 of the Capper-Volstead Act.

visions of section 1 of the Capper-Volstead Act mean what they say—Members of cooperatives must be "producers of agricultural products" as "farmers" or "fruit growers." The question has not been but should be settled by this Court. Particularly is this so when the Court of Appeals *misread* this Court's decision, in the *Winckler* case *as* settling it and unless reversed will annul the provisions of Section 1 prescribed by Congress limiting membership of cooperatives to producers of agricultural products. Organizers of cooperatives doing billions of dollars of business in competition with individual enterprise will so rely on the Court of Appeals decision.

Both the District Court and the majority of the Court of Appeals misinterpreted the Supreme Court's decision in the *Winckler* case on the issue. Both relied upon the *Winckler* case as holding that Sunkist was an association meeting the requirements of section 1 of the Capper-Volstead Act.

On March 2, 1964, the District Court in its oral pronouncement on the issue (upon which pronouncement Pre-Trial Order No. 1, drafted by Sunkist, was based) stated with respect to the Capper-Volstead issue:

> The Court: "I tell you frankly that I am not going into that issue in this case. I am going to rely upon the *Winckler* case . . ." (R. Tr. 22A:16-23).

> The Court: "Yes. I have overruled the objcetions. *I don't know how it came up now and how the issue was raised,* but I am going to rule that they have complied." (R. Tr. 45A:16-18) (Our emphasis)

When the District Court asked Sunkist's counsel:

> "Don't you think that that issue was disposed of in the *Winckler* case by the Supreme Court"—he replied: "We believe the Court is absolutely correct." (R. Tr. 24A:6-15).

The majority of the Court of Appeals in its decision (App. A, *infra*, p. 36) stated:

> "The District Court concluded, and we think correctly, that under the decision of the Supreme Court in Sunkist Growers, Inc. v. Winckler & Smith Co., supra, Sunkist Growers, Inc., is a cooperative organized in compliance with Section 1 of the Capper-Volstead Act. It is true, as appellant argues, that this issue was not specifically raised in the Winckler case, but the Court did describe the Sunkist organization in detail."

The Supreme Court in the *Winckler* case did *not* hold that Sunkist was a cooperative organized in compliance with section 1 of the Capper-Volstead Act. *Winckler* CONCEDED that Sunkist was such a cooperative.

The dissenting member of the Court of Appeals stated:

> "The principal reason offered by the majority in support of the view which I question is its asserted belief that the question was settled in *Sunkist* v. *Winckler & Smith Co.*, 370 U.S. 19, 8 L Ed. 2d 305, 82 Sup. Ct. 1130 (1062). I do not so interpret that decision. The particular issue was not presented to the Supreme Court, and it was not adjudicated. It was apparently conceded by the parties in *Winckler*, of which the appellant here was not one, that Sunkist was covered by the Capper-Volstead exemption. In the prior opinion of the Court of Appeals, reported at 284 F.2d 1 (9th Cir. 1960), the only discussion of the exemption pertained to its extent, not to whether or not it was applicable. Furthermore, the Supreme Court in granting certiorari, 368 U.S. 813 (1961), expressly limited its consideration to a single question, namely,
>
> 'Where a group of citrus fruit *growers* form a cooperative organization for the purpose of collectively processing and marketing their fruit, and carry out those functions through the agency of three cooperative agricultural associations, each of which is basically *wholly owned and governed by those growers*,

> *and each of which is admittedly entitled to the exemption from the antitrust laws accorded to agricultural cooperatives by the Capper-Volstead Act* (7 U.S.C.A., sec. 291)—is an unlawful conspiracy, combination or agreement established under Sections 1 and 2 of the Sherman Act upon proof only that these *growers*, through the agency of these three cooperatives, *agreed among only themselves* with respect to the extent of the division of the function of processing between them or with respect to the price they would charge in the open market for the fruit and the by-products thereof processed and marketed by them?' (Emphasis supplied.)'' (App. A, *infra*, pp. 40-41)

(See also quotations from briefs to this Court in the *Winckler* case, *infra*.)

The issue decided by this Court in the *Winckler* case involved Sunkist's contention that "Sunkist, Exchange Orange, and Exchange Lemon being made up of the same growers of associations, cannot be charged with conspiracy among themselves." (370 U.S. at p. 20). This Court construed that the District Court's instructions "quite plainly left it open for the jury to base their verdict upon a finding of a conspiracy among petitioners [Sunkist and Exchange Orange] and Exchange Lemon" (370 U.S. at p. 25). It stated: "We are squarely presented, then, with the question of whether Sunkist, Exchange Orange and Exchange Lemon —the three legal entities formed by these 12,000 growers— can be considered independent parties for the purposes of §§ 1 and 2 of the Sherman Act." It held: "We conclude not." (370 U.S. 27).

We submit: That is *what* this Court held respecting section 1 of the Capper-Volstead Act and that is *all* this Court held.

The majority of the Court of Appeals (App. A, *infra*, pp.

36, 37) quoted and relied upon a statement by the Supreme Court in the *Winckler* case that "the language of the Capper-Volstead Act is specific in permitting concerted efforts by farmers" and that "the legislative history of the Act reveals several references to the Sunkist organization" including a suggestion by Senator Capper that this was a type of cooperative that would find "definite legalization under the legislation." (370 U.S. 28). The Supreme Court's statement was made solely with reference to its holding that Sunkist, Exchange Orange and Exchange Lemon could not be considered independent parties under the conspiracy provisions of the Sherman Act.

This Court's statement and reasoning is entirely consistent with its statement in the *Milk Producer's* case (362 U.S. at p. 466) that the House Report on the Capper-Volstead Act indicated "a purpose to make it possible for *farmer producers* to organize together "for the purposes of the act" (Our emphasis). It was "the concerted efforts by *farmers*" (our emphasis) that was held to be unobjectionable in the *Winckler* case. This Court's reasoning also accords with its decision in the *Borden* case where it ruled that a cooperative violated section 1 of the Sherman Act when it conspired with non-cooperatives to fix milk prices. (It would seem inconsistent for cooperatives to have nonproducer of agricultural products as members when members of cooperatives may associate to fix prices of products they produce.) The dissenting judge pointed out "that, while there are no decisions" on the issue, the language of this Court in the *Borden* case and the *Milk Producers* case (quoted by the dissenting judge) supported his conclusion that it is "plainly required" by the terms of section 1 of the Capper-Volstead Act that members of cooperatives be producers of agricultural products. (App. A, *infra*, pp. 42-44)

The majority of the Court of Appeals also states (App. A, *infra*, p. 38):

> "Associations organized under the Capper-Volstead Act 'may make the necessary contracts and agreements to effect' the purposes of the Act, i.e., 'collectively processing, preparing for market, handling, and marketing' their products. (7 U.S.C. 291). The agency associations supply services which the growers require (packing house facilities) in handling and marketing their products. The fact that the *'packing is done by local associations* * * * and the processing by separate organizations' does not preclude the growers from being considered one association for purposes of the Capper-Volstead Act. Sunkist Growers, Inc. v. Winckler & Smith Co. supra." (Our emphasis.)

Again, the quotation from the *Winckler* case related to the Supreme Court's ruling that cooperatives organized by the same grower associations may be deemed one cooperative. The quoted provision of section 1 that associations may make the necessary agreements to effect the purposes of the act would appear to refer only to agreements between the association and its *members*. But—assuming the provision authorizes such agreements with *nonmembers:* As is stated by the dissenting Judge of the Court of Appeals (App. A, *infra*, p. 42, footnote 1):

> "The stipulation [Capper-Volstead stipulation] does *not* say that the associations were independent contractors. It recites that they were *'members'* of the Sunkist system. If the association were truly separate and independent, then that determination should be made, in the first instance, by the District Court. If they were not 'members' of the Sunkist system, then, as I see it, the exemption of the Capper-Volstead Act

is irrelevant to the issue of the propriety of Sunkist's dealing with them. *United States* v. *Borden Co., supra.*" (Emphasis, dissenting judge.)

II

Even if the Supreme Court in the *Winckler* case *had* held that Sunkist was organized in compliance with Sec. 1 of the Capper-Volstead Act, its decision would be neither binding nor precedent here. As the dissenting Judge of the Court of Appeals states:

> "Even if the issue had been determined by the Supreme Court in *Winckler,* the admitted nature of Sunkist's present organizational make-up is such that the exemption should no longer be held properly to apply. The privilege to act together in 'exempt' associations is conferred only upon 'persons engaged in the production of agricultural products . . . .' 7 U.S.C. § 291. The plain import of the statutory language is that such an association must be composed *solely* of agricultural producers. Regardless of whether Sunkist was thus composed at the time of the *Winckler* decision in 1962, as the Supreme Court's order granting certiorari, *supra,* indicates, it is clear that *the composition is no longer the same.* In our case, it is conceded that the so-called 'agency associations,' which comprise almost 15% of the membership of the Sunkist organization, are *not* growers or producers." (App. A, *infra,* pp. 41, 42; our emphasis.)

Further: The composition of Sunkist's membership in the *Winckler* case as it appears from the briefs to this Court and from this Court's decision in that case was that *all* Sunkist's packing house members were associations composed of fruit growers. On pages 5 and 6 of Sunkist's brief to this court in the *Winckler* case (filed February 7, 1962) Sunkist stated:

> "*Each of these corporate entities* [Sunkist, Exchange Orange and Exchange Lemon] *handles only the fruit of Sunkist grower-members.* . . . . Each of them complies in all respects with the organizational and other conditions prescribed by the Capper-Volstead Act for immunity from the sanctions of the antitrust laws in respect of such collective processing, handling and marketing of agricultural products. Indeed, that they do so comply was conceded below by all concerned. . . . *At the base of the Sunkist system are the individual growers. It is their fruit, and only their fruit, that is handled by Sunkist.* It is they who control and manage all components of the Sunkist cooperative organization. *The individual growers have organized into local associations.* . . ." (Our emphasis.)

The respondent Winckler did not challenge Sunkist's description of the Sunkist system. To the contrary, on page 7 of its brief to this court (filed March 7, 1962), Winckler stated:

> "With a few additions deemed essential to an adequate factual presentation, respondents accept petitioner's description of the organization and functions of the constituent elements of the so-called Sunkist system of cooperatives."

This Court appears to have accepted these representations that *All* of Sunkist's packing house members were composed of *grower associations.*

> "Sunkist Growers, Inc., has at its base 12,000 growers of citrus fruits in California and Arizona. *These growers are organized into local associations which operate packing houses."* (Emphasis supplied) (370 U.S. at p. 21).

* * * * * * *

"In sum, *the individual growers involved each belong to a local grower association.*" (Our emphasis.) (370 U.S. at p. 22).

Whatever may have been the situation in the *Winckler* case (where it was unchallenged that all the packing houses were grower associations) it is clear from the record in *this* case that approximately 15% of Sunkist's packing house *members* supplying approximately 13% of Sunkist's fruit were *not* fruit growers, *not* associations of fruit growers but profit making corporations.

III

In discussion following, we refer to certain publications of the Department of Agriculture which documents the Court may judicially notice.[3]

Agricultural cooperatives whose members join together and fix prices of their products and who enjoy tax and financing advantages not accorded profit making enterprises are numbered in the thousands and market billions of dollars of products. Their volume of business is on the increase. They compete with private corporations at all levels of trade.

The tax and financial advantages accorded cooperatives is illustrated on pp. 19-22 of U. S. Department of Agriculture FCS Bulletin 1 "Farmer Cooperatives in the United States" (App. D, *infra*, pp. 58, 61, 64-69).

The U.S. Department of Agriculture publication "Statistics of Farmer Cooperatives—1963-64" (p. 2) shows that the marketing volume of cooperatives marketing farm products increased from approximately $8 billion in the year

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[3] *Tempel* v. *United States*, 248 U.S. 121 (1918); *Atlantic Transport Co. of West Virginia* v. *Rosenberg Bros. & Co.*, 34 F.2d 843 (9th Cir. 1929); *Interstate Natural Gas Co.* v. *Southern California Gas Co.*, 209 F.2d 380 (9th Cir. 1953). For the Court's convenience the particular pages of the documents referred to in the discussion are reproduced in Appendix D.

1950-51 to over $14½ billion in the year 1963-64. (App. d, *infra,* pp. 70-71). And (p. 16 of such publication) that the number of such cooperatives during the period ranged from 6,519 in the year 1950-51, to 5,421 in the year 1963-64. Mergers accounted in part for the decrease in the total number of cooperatives. (App. D, *infra,* pp. 73-76).

It appears that the Department of Agriculture has never questioned but that section 1 of the Capper-Volstead Act means what it says: Members of Cooperatives must be composed of producers of agricultural products or (as in this case) associations composed of such producers.

In FCS Bulletin 1—*Farmer Cooperatives in the United States* it is stated (p. 15):

> "For an agricultural cooperative to come within the Capper-Volstead Act, *it must be composed of* 'persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or *fruit growers.*" (Our emphasis, App. D., *infra,* p. 60)

In the U. S. Department of Agriculture FCS Circular 18, November 1956, *"Organizing A Farmer Cooperative",* in suggested Bylaws of organization forms, the qualifications of members are stated (p. 23) in part, as:

> "Section 1. *Qualifications.* Any person, firm, partnership, corporation or association, *who is a bona fide producer of agricultural products . . .*" (Our emphasis, App. D., *infra,* pp. 77, 79).

Sunkist's operations constitute an Exhibit A example of a mammoth combination illegally taking advantage of privileges intended only for bona fide cooperatives and competing on different trade levels with profit-making enterprises.

During the years involved in this action (year 1954-5 to year 1961-2) Sunkist's average control of oranges was approximately 70% of all produced in the California-Arizona

market. Total oranges produced in the market during this period ranged from 24½ million boxes in the year 1957-58 to over 40½ million boxes in the year 1954-55. (Plf's Exh. 92). The Sunkist dollar value of oranges controlled by it during this period ranged from $99½ million, in the year 1954-55 to over $117½ million in the year 1957-58. (Plf's Exh. 97) Sunkist's total sales for the year 1957-58 were $183 million. (Re. Tr. 1104-1105, Plf's Exh. 112).

Sunkist's marketing of product oranges (the oranges involved in this action) was vertically integrated with dual distribution. It sold products in competition with manufacturers of orange products who purchased orange supplies from Sunkist. (General Foods, Re. Tr. 543:4-10; 549:12-550:3; Hyland-Stanford Co., Re. Tr. 513:12 to 514:6; Tree-Sweet, Re. Tr. 345:2-22; 706:13-25; Case-Swayne Co., Plf's Exhs. 131, 132, Re. Tr. 792:6-13; 823:3-17).

Sunkist's hundreds of extremely diversified orange products (sold in competition with products of private enterprises) included such items as "juices, concentrates, oil, pectin, pharmaceuticals and cattle feed." *Winckler* case, 370 U.S.C. at p. 21, footnote 1.

Conclusion

This petition is based upon the following considerations:

I

The case presents a new and major question of law which the courts have not authoritatively resolved and which this court should resolve.

II

The majority of the Court of Appeal's *misreading* of this Court's decision in the *Winckler* case is calculated to cause lawyers, businessmen, cooperative organizers and others to mistake the Court of Appeal's ruling as one based on a

ruling by the Supreme Court that profit making enterprises that do not produce agricultural products may be members of cooperatives.

III

The majority of the Court of Appeals failed to apprehend that the "make-up" of Sunkist's packing house membership in this case (where it included profit making enterprises that were not producers of agricultural products) was *not* the same as it appeared to be in the *Winckler* case (where it was unchallenged that the packing houses were *all* grower associations).

IV

The tremendous importance of the question presented is illustrated by the role played by cooperatives in our national economy. Thousands of cooperatives (enjoying limited antitrust immunity and tax advantages) do billions of dollars of business in competition with individual enterprise at all levels of trade.

The petition for writ of certiorari should be granted.

Respectfully submitted,

WILLIAM H. HENDERSON,
W. GLENN HARMON,
by —— —— —— ——

J. EDWARD JOHNSON,
RICHARD A. PERKINS.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 20,070

CASE-SWAYNE CO., INC., a corporation, *Appellant*,

vs.

SUNKIST GROWERS, INC., a corporation, *Appellee*.

[November 21, 1966]

On Appeal from the United States District Court for the Southern District of California, Central Division

Before: JERTBERG and ELY, Circuit Judges, and JAMESON, District Judge.

JAMESON, District Judge:

This is an action seeking treble damages under section 4 of the Clayton Act (15 U.S.C. § 15) [1] for alleged monopoly and attempt to monopolize in violation of sections 1 and 2 of the Sherman Act (15 U.S.C. § 1, 2).[2] The district court

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[1] 15 U.S.C. § 15 provides:

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

[2] 15 U.S.C. § 1 provides in part:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: * * *"

* * * * * * *

Section 2 provides in part:

"Every person who shall monopolize, or attempt to monopolize, or

granted the defendant's motion for a directed verdict at the close of plaintiff's case.[3]

Plaintiff (appellant), Case-Swayne, Inc., is engaged in the manufacture of single strength juices (canned orange juice and blends of orange juice with other fruit juice) as an independent operator. Defendant (appellee), Sunkist Growers, Inc., is an association of citrus producers.[4] It has as its base 12,000 citrus growers in Southern California and Arizona. The growers are organized into local associations which operate packing houses. The associations in turn are grouped into district exchanges and representatives from the exchanges make up the governing board of Sunkist. The Sunkist organization handles its members' fruit in effect from tree to store.

Appellant contends that the district court erred (1) in granting the defendant's motion for a directed verdict; and (2) in ruling that Sunkist was organized in conformance with section 1 of the Capper-Volstead Act[5] and therefore could not be held in violation of section 1 of the Sherman

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combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor * * *."

[3] At the close of plaintiff's case, the defendant moved for dismissal under Rule 41(b) F.R. Civ. P. or for a directed verdict under Rule 50(a). The court first indicated that it would dismiss pursuant to Rule 41(b), but later concluded that the motion for dismissal was improper and granted defendant's motion for a directed verdict under Rule 50(a).

[4] In addition to Sunkist Growers, Inc., the complaint named Exchange Orange Products Company and Exchange Lemon Products Company as defendants. Subsequently Exchange Orange and Exchange Lemon merged into Sunkist Growers, Inc., which assumed all of the obligations of the merged corporations, and the action was dismissed as to Exchange Orange and Exchange Lemon.

[5] Section 1 of the Capper-Volstead Act (7 U.S.C. 291) provides that, "Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purpose: * * *."

Act for conspiracy to restrain and monopolize trade in product oranges. If Sunkist Growers, Inc., was in fact organized as an agricultural cooperative association pursuant to the Capper-Volstead Act, as the district court found, any interorganizational dealings among the various agricultural cooperative associations are immune from the conspiracy provisions of section 1 of the Sherman Act;[6] but Sunkist may still be found liable under section 2 of the Sherman Act for wrongful use of monopoly power and attempt to monopolize.[7] The question presented under the first specification in error is whether the evidence was sufficient for the jury to find that Sunkist wrongfully used monopoly power or attempted to monopolize trade in product oranges.

In ruling on a motion for a directed verdict the trial court is required to view the evidence in the light most favorable to the party against whom the motion is made. "On appeal, likewise, the appellate court must consider the evidence in its strongest light in favor of the party against whom the motion * * * was made, and must give him the advantage of every fair and reasonable intendment that the evidence can justify". 5 Moore's Federal Practice 2316 (2d.ed. 1951). This is true "even though contrary inferences might reasonably be drawn". Continental Ore Co. v. Union Carbide, 1962, 370 U.S. 690, 696, 82 S.Ct. 1404, 8 L.Ed. 2d 777.

Sunkist controlled approximately 70% of all oranges produced in Southern California and Arizona, and approximately 67% of the oranges diverted to product use. Product or "excess" oranges are those not sold as fresh fruit. They are used to make various orange products and are the only kind used by plaintiff in its business. On a national basis Sunkist controlled 6 to 7% of the total production.

Other small cooperatives controlled for their own use approximately 18% of the oranges grown in Southern Cali-

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[6] See Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., 1962, 370 U.S. 19, 82 S.Ct. 1130, 8 L.Ed.2d 305.

[7] See Maryland & Virginia Milk Producers Ass'n, Inc. v. United States, 1960, 362 U.S. 458, 80 S.Ct. 847, 4 L.Ed.2d 880; Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., supra.

fornia and Arizona. The balance of the oranges, approximately 12%, represented those grown by independent growers and available to independent manufacturers.

Additional facts set forth in the order granting defendant's motion for directed verdict include the following:[8]

(1) Prior to the development of the citrus juice industry there was no market for fruit not required by the fresh fruit market, and the remainder of the fruit, then called "culls", was destroyed by the packing houses. With the development of the citrus juice industry, the demand for culls, now designated "excess fruit", could be sold to processors to convert into juiece and other by-products.

(2) At the beginning of its processing activity plaintiff had no difficulty in obtaining at a reasonable price sufficient fruit for its needs. When it was demonstrated that conversion of excess fruit into juice and other citrus by-products was profitable, Sunkist decided to process its own fruit and for that purpose organized Exchange Orange Products Company and Exchange Lemon Products Company.

(3) Fruit not so processed was sold to independent processors, including plaintiff. Sunkist had excess fruit available for sale to independent processors only when it was unable to process its own fruit. For several years Sunkist sold its excess fruit to independent processors by a bid system. All independent processors, including plaintiff, were invited to present bids for fruit to be sold.

(4) As time went on and as Exchange Orange and Exchange Lemon developed processing capabilities, more and more excess fruit from Sunkist packing houses was channeled to Exchange Orange and Exchange Lemon until, at the present time, practically no Sunkist fruit is sold to independent processors.

(5) Plaintiff attempted to obtain from other mutual citrus associations its requirement of fruit to process, only to find that such associations had entered into individual con-

[8] All of the facts are substantially in the language of the district court, although they do not appear in the court's order in the same sequence.

tracts with other processors; hence plaintiff was able to obtain very little fruit supply from mutual associations.

(6) Approximately 12,000 citrus fruit growers annually signed contracts with Sunkist agreeing to sell fruit through the Sunkist organization. The contracts provided that if a grower did not abide by his contract, sanctions might be imposed. Occasionally a grower failed to sell his fruit to Sunkist, and sanctions were imposed by the Sunkist organization.

(7) Sunkist trade-mark or trade name was a valuable asset, and defendant had spent large sums in establishing its trade-mark or trade name.

(8) Sunkist employees observed operations of member growers to make certain that the growers handled their crops through the Sunkist organization and if it was discovered that a member grower sold fruit contrary to his contract ,a report was made to Sunkist and, in certain instances, penalties were imposed upon the violating grower.

(9) The Department of Agriculture, pursuant to the school lunch program, requested bids for single strength orange juice. One year Sunkist bid but did not receive the contract and another year, Sunkist bid and was awarded the contract.

(10) Sunkist made a large profit from sale of citrus fruit.

(11) The great majority of citrus grown in Southern California and Arizona goes into the fresh fruit market. The greater amount of oranges grown in Florida goes into the citrus products market. Fresh fruit from California, Arizona and Florida compete on the eastern and foreign markets.

(12) It was possible for processors in Florida to make single strength orange juice, can and ship it to California, and sell it at the same price as (or at a price lower than) the Southern California-Arizona produced juice. Florida processors of single strength orange juice could assimilate transportation costs from Florida to California and sell their product in competition with single strength orange juice made within the Southern California-Arizona area. This was possible because of the lower price for which Florida fruit could be purchased.

(13) The price paid for Florida oranges was the dominant factor in determining the price for which single strength orange juice could be sold to the ultimate consumer.

(14) There is also competition between single strength orange juice and orange juice concentrates. Neither of the parties is a producer of concentrated or frozen juice.

The alleged violations of the Sherman Act arise out of "Sunkist's dominant control of oranges grown in Arizona and California together with its vertical integration and dual distribution with respect to oranges designated for product use . . .". More particularly, plaintiff complains that it was unable to purchase oranges for product use from Sunkist at a price that would enable it to compete with canned juice shipped in from Florida.[9]

The district court's granting of the directed verdict was premised upon the conclusioin that the "relevant market" was national rather than limited to California-Arizona, and that in light of this plaintiff had not shown evidence of an illegal monopoly.[10]

The cases uniformly hold that "a party has monopoly power if it has over 'any part of the trade or commerce among the several states', a power of controlling prices or unreasonably restricting competition". United States v. du Pont & Co., 1956, 351 U.S. 377, 389, 76 S.Ct. 994, 100 L.Ed. 1264. In determining whether a party has monopoly power it is first essential to define the "relevant market".

This court has held that determination of the relevant market, "both as respects products and as concerns geographical area" is a "necessary step precedent to determining whether within that market there was a probability" of violation of section 7 of the Clayton Act. Crown Zellerbach

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[9] This is not a complete statement of the alleged monopolistic acts of Sunkist, but it is the act upon which plaintiff places the most emphasis.

[10] The district court initially was of the opinion that the relevant market was Southern California and Arizona, but concluded, when all of the evidence was presented, that the relevant market for product oranges was a national market, "and that whatever happened in Florida directly affected prices in California and vice versa. Prices paid for oranges in California depended substantially upon the price for which oranges were sold in Florida".

Corporation v. F.T.C., 1961, 296 F.2d 800, 804, (cert. denied (1962)) 370 U.S. 937, 82 S.Ct. 1577, 8 L.Ed.2d 806. While Crown Zellerbach involved a violation of the Clayton Act with respect to corporate acquisitions, it is clear that the same determination must be made regarding the relevant market in actions for violation of section 2 of the Sherman Act. United States v. du Pont & Co., supra.

In the recent case of United States v. Grinnell Corp., 1966, 384 U.S. 563, —— S.Ct. ——, —— L.Ed.2d ——, a civil suit for alleged violations of section 2 of the Sherman Act, the Court said in part:

> "* * * That * * * case arose under § 7 of the Clayton Act where the question was whether the effect of a merger 'in any line of commerce' may be 'substantially to lessen competition.' We see no reason to differentiate between 'line' of commerce in the context of the Clayton Act and 'part' of commerce for purposes of the Sherman Act." (384 U.S. at 573).

In determining the "relevant market" applicable in this case, it seems advisable first to analyze separately the factors involved in both the relevant *product* market and the relevant *geographic* market.

Relevant Product Market

United States v. du Pont & Co., supra, relied upon by the district court in granting Sunkist's motion for a directed verdict, promulgated the test of "reasonable interchangeability" to determine the relevant product market. The Government contended that cellophane was the relevant product market. The Court assumed that if this were true, du Pont would have monopoly power over that market. The Court found, howevevr, that cellophane was "reasonably interchangeable" with other flexible wrappings ,and that the relevant product market accordingly was "flexible packaging materials" rather than cellophane alone.

The rule of "reasonable interchangeability" has been refined and modified in subsequent cases. In particular, the courts have recognized that there may be an outer market and one or more inner submarkets within which competitive

effects are to be appraised, i.e. a relevant submarket may constitute the product market for antitrust purposes.

In Brown Shoe Co. v. United States, 1962, 370 U.S. 294, 82 S.Ct. 1502, 8 L.Ed.2d 510, involving a merger found to be in violation of section 7 of the Clayton Act, the Court said in part:

> "The 'area of effective competition' must be determined by reference to a product market (the 'line of commerce') and a geographic market (the 'section of the country').
>
> "The Product Market
>
> "The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. However, within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes. (citation) The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." (370 U.S. at 324-5).

The rule of Brown Shoe was expressly applied to cases arising under section 2 of the Sherman Act in the recent case of United States v. Grinnell Corporation, supra, where the Court esaid:

> "In § 2 cases under the Sherman Act, as in § 7 cases under the Clayton Act (Brown Shoe Co. v. United States, 370 U.S. 294, 325) there may be submarkets that are separate economic entities." (384 U.S .at 573).

Relevant Geographic Market

In Brown Shoe, supra, the Court also set forth criteria to be used in determination of the geographic market:

"The Geographic Market

"The criteria to be used in determining the appropriate geographic market are essentially similar to those used to determine the relevant product market. See S. Rep. No. 1775, 81st Cong. 2d Sess. 5-6; United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586, 593. Moreover, just as a product submarket may have § 7 significance as the proper 'line of commerce', so may a geographic submarket be considered the appropriate 'section of the country.' (Citing cases). Congress prescribed a pragmatic, factual approach to the definition of the relevant market and not a formal, legalistic one. The geographic market selected must, therefore, both 'correspond to the commercial realities' of the industry and be economically significant. Thus, although the geographic market in some instances may encompass the entire Nation, under other circumstances it may be as small as a single metropolitan area." (370 U.S. at 336-7).

In the recent case of United States v. Pabst Brewing Company, et al., 1966, 384 U.S. 546, 552 —— S.Ct. ——, —— L.Ed.2d ——, involving the acquisition in 1958 by Pabst Brewing Company of Blatz's Brewing Company, the Court held that the "evidence as to the probable effect of the merger on competition in Wisconsin, in the three-state area (Wisconsin, Illinois and Michigan), and in the entire country was amply sufficient to show a violation of § 7 (of the Clayton Act as amended by the Celler-Kefauver Anti-Merger Amendment) [11] in each and all of these three areas". In 1957, prior to the merger, the two companies had combined sales which accounted for 23.95% of the beer sales in Wisconsin, 11.32% of the sales in the three-state area, and 4.49% of the sales throughout the country.

[11] 38 Stat. 731, as amended, 64 Stat. 1125, 15 U.S.C. § 18 (1964 ed.)

The Court was unanimous in holding that the district court erred in dismissing the complaint. Mr. Justice Harlan (joined by Mr. Justice Stewart) in a concurring opinion agreed with the district court that viewing the entire continental United States as a relevant market, the evidence did no sustain the Government's contention that the acquisition might substantially lessen compeition. They agreed with the majority opinion, however, as did Mr. Justice Fortas, that the Government's evidence was sufficient to establish prima facie that Wisconsin and the tri-state area were proper "sections of the country" in which to measure the probable effects of the acquisition.

In his concurring opinion, Mr. Justice Harlan said in pertinent part:

> "The appropriate geographic area in which to examine the effects of an acquisition is an area in which the parties to the merger or acquisition compete, and around which there exist economic barriers that significantly impede the entry of new competitors. * * *" (384 U.S. at 556-7).

Whether a geographical location is or is not an "area of effective competition" is a question of fact in each case. United States v. Columbia Pictures Corporation, S.D. N.Y., 1960, 189 F.Supp. 153, 192. The area may be limited by differences in costs of production and transportation. Erie Sand & Gravel Co. v. F.T.C., 3 Cir. 1961, 291 F.2d 279, 281. "A competitive price disadvantage arising from transportation costs is an important factor in determining the scope of a relevant market". United States v. Penn-Olin Chemical Company, D. Del., 1963, 217 F.Supp. 110, 120; American Crystal Sugar Co. v. Cuban-American Sugar Co., S.D. N.Y., 1957, 152 F.Supp. 387, 398, Aff'd 2 Cir. 1958, 259 F.2d 524.

It seems clear from the decided cases that (1) while the outer limits of the market may be determined by the competition of interchangeable products, (2) there may be a well-defined submarket which constitutes the relevant market for antitrust purposes, which (3) must correspond to the commercial realities of the industry, (4) is affected by price

disadvantages due to transportation costs, (5) is affected by availability of a buyer to supply and existence of economic areas which significantly impede competition, (6) is determined in part with relatieon to the parties affected in the suit, and (7) is a question of fact in the particular case.

We come now to an application of the criteria for determining both relevant product market and relevant geographic market to the facts in this case. In advance of trial it was the position of the trial court, as set forth in its pretrial order, that the relevant product market was product oranges and the relevant geographic market Southern California and Arizona. At the close of plaintiff's case, the court was persuaded that the relevant product market included orange juices and concentrates and that the relevant geographic market was national rather than limited to Southern California and Arizona.[12]

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[12] In ruling on defendant's motion for dismissal or a directed verdict, following argument by counsel, the court said:

> "I was of the opinion that Florida was not a part of the market; that it was to be limited to Southern California and Arizona. I was of the opinion and still am of the opinion that it would certainly be uneconomical to try to ship fresh fruit from Florida or from Texas to California for the purpose of being converted into orange juice. So I have to look first to what is the competition in this case, what are the competitive factors?
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> "Well, if we include Florida as part of the market, then of course Sunkist does not have a dominant place in this picture at all. It is a very minor part of the conversion of fresh fruit into orange juice, if we consider Florida as a part of the market.
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> "Then I thought we were talking about product oranges, the monopoly of product oranges. But it seems to me that we now are talking about product oranges, but also about the juice squeezed from the product oranges. I don't know how you can say that there is a monopoly on product oranges without saying there is a monopoly on the juice that is squeezed from product oranges." (Rep. Tr. 1378:1-20).
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> "So it seems to me that when we talk about competition, we are going to talk about competition not only of the fruit before it is squeezed, but the product after the squeezing, that is the orange juice.
>
> "Well, if you consider it in that light, then there is lots of competition on the shelves of Southern California, because the testimony is that the Florida producers, the Florida producers of orange juice, that is, those who squeeze the oranges to make orange

It is clear from the evidence that *orange products* (single strength juice and frozen concentrates) were sold in a national market. Oranges could be processed in Florida, and the juice shipped to California and sold competitively with juice processed in California from California oranges. Sunkist held a relatively small part of this national market and controlled neither quantity nor price.

On the other hand, it is equally clear that it was uneconomical for producers of orange products to buy their *product oranges* in Florida or elsewhere than in the Southern California-Arizona area. Sunkist controlled 70% of all oranges grown in this area and 67% of the product oranges. A substantial portion of the remaining product was unavailable to Case-Swayne.

Appellee does not question these facts, but contends that the relevant geographic market for product oranges was national on the theory that the product orange supply is tied irrevocably to orange product price. Appellee argues that product oranges "have value only because they can be converted into a product which has value", and that "the value of product oranges cannot exceed that which will permit them to be processed into products and then compete in a national products market dominated by Florida".

While product oranges may have little, if any, value per se, the same is true of many raw products. The market for raw products is among the processors rather than the ultimate consumer. We see no reason why the raw product may not be the relevant product market, even though it has little value in its raw state. Moreover, it is clear from the recent case of United States v. Pabst Brewing Company, supra, that even as to the processed product, the relevant market may at the same time be national, regional, and statewide in area.[13]

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juice in Florida, can ship it to Los Angeles, pay the shipping charges, and undersell the California product.

"So from these two standpoints, that is talking about competition, what is competition—competition is the competition in the open marketplace." (Rep. Tr. 1379:9-22).

[13] We concluded in Sunkist Growers, Inc. v. Winckler & Smith Citrus Prod. Co., 9 Cir. 1960, 284 F.2d 1, that the relevant market area for

While Sunkist could not control the supply or price of canned juices because of competition from Florida in these products, there was substantial evidence that it did control the supply of product oranges from which juice was made in California and Arizona. In determining the relevant geographic market, a proper test is the "geographic structure of supplier-customer relations." United States v. Philadelphia National Bank, et al., 1963, 374 U.S. 321, 357, 83 S.Ct. 1715, 10 L.Ed.2d 915. The relevant market is determined in part by the market area "to which the purchaser can practicably turn for supplies". Tampa Electric Co. v. National Coal Co., 1961, 365 U.S. 320, 327, 81 S.Ct. 623, 5 L.Ed.2d 580.[14] There is no question that Case-Swayne and other users of product oranges could not as a practical matter obtain product oranges from supplies outside California and Arizona.

Moreover, even though the price of product oranges in Florida would influence the price of product oranges in California, there was evidence from which the jury might find that Sunkist by reason of its control of the supply also as a practical matter controlled the price.[15] That is particularly true if it should be found that Sunkist refused to sell to plaintiff and other independent buyers at any price.

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oranges and by-products, including fruits and juices, was the California-Arizona area, although it does not appear that the parties in that case argued or the court considered the distinction between product oranges and orange products or any contention that the market was national.

[14] See also Standard Oil Co. v. United States, 1945, 337, U.S. 293, 299, note 5, 69 S.Ct. 1051, 93 L.Ed 1371.

[15] Morgan Ward, who handled the oranges of most of the independent growers, testified in pertinent part:

> "Q Is it your opinion, then, that the market conditions with respect to Florida product oranges have more effect on the price of product oranges in California than any one factor?
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> "A They have effect on the over-all United States. Then those who set prices on the fruit in California look at what is going on all over the United States, and at that time the prices were set in California by the leading growers, Sunkist set it, using all those things to do it, I assume. But the price of by-products in this state has ever since I have been in the business since 1934, been set by Sunkist. At one time it was called California Fruit Growers Exchange, and Sunkist at this time." (Rep. Tr. 392:1-14).

As Mr. Justice Fortas said in his dissenting opinion [16] in the recent case of United States v. Grinnell Corporation, supra, "The central issue is where does a potential buyer look for potential suppliers of the service—what is the geographical area in which the buyer has, or, in the absence of monopoly, would have, a real choice as to price and alternative facilities? This depends upon the facts of the market place, taking into account such economic factors as the distance over which supplies and services may be feasibly furnished, consistently with cost and functional efficiency." (384 U.S. at 589).

We conclude that there was evidence from which the jury might properly find that the relevant product market was product oranges and the relevant geagraphic market Southern California-Arizona.

Evidence of Wrongful Use of Monopoly Power and Attempt to Monopolize

If the jury should find that Southern California and Arizona was the relevant market, there was sufficient evidence from which the jury could find further that Sunkist engaged in monopolistic practices or an attempt to monopolize proscribed by section 2 of the Sherman Act.

As the Court said in United States v. Grinnell Corp., supra:

> "The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."
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> * * *
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> "In United States v. du Pont & Co., 351 U.S. 377, 391, we defined monopoly power as 'the power to control

[16] Justices Fortas, Stewart and Harlan would have remanded for a "new determination" of the basic issue of "the definition of the relevant market".

> prices or exclude competition.' The existence of such power ordinarily may be inferred from the predominant share of the market. In American Tobacco Co. v. United States, 328 U.S. 781, 797, we said that 'over two-thirds of the entire domestic field of cigarettes and . . . ; over 80 per cent of the field of comparable cigarettes' constituted 'a substantial monopoly.' " (384 U.S. at 570-1).

It is clear that Sunkist had possession of monopoly power in the relevant market, if that market is found to be the Southern California-Arizona area.

It is true, as appellee contends, that size alone does not constitute an offense under the Sherman Act; nor does the mere possession of monopoly power. It is the wrongful use and exercise of that power which is proscribed by section 2 of the Act.

However, the ultimate consideration in determining whether an alleged monopolist violates section 2 of the Sherman Act is "whether the defendants control the price and competition in the market for such part of trade or commerce as they are charged with monopolizing". United States v. du Pont & Co., supra, 351 U.S. at 380. It is not always necessary to find a specific intent to find that an antitrust law has been violated. "It is sufficient that a restraint of trade or monopoly results as the consequence of a defendant's conduct or business arrangements (citing cases). To require a greater showing would cripple the Act. As stated in United States v. Aluminum Co. of America, 148 F.2d 416, 432, 'no monopolist monopolizes unconscious of what he is doing.' Specific intent in the sense in which the common law used the term is necessary only where the acts fall short of the results condemned by the Act." United States v. Griffith, 1948, 334 U.S. 100, 105, 68 S.Ct. 941, 92 L.Ed. 1236.

Appellant contends that Sunkist wrongfully exercised its monopoly power through (1) boycotting appellant by refusing to sell appellant product oranges while selling to other processors; (2) preventing TreeSweet from delivering oranges TreeSweet had committed to appellant; (3) con-

trolling orange prices; and (4) eliminating competitors (or as with appellant, limiting their profits) by maintaining high prices for oranges or reducing supply.

The same acts are relied upon in support of appellant's contention that Sunkist intentionally attempted to monopolize the trade in product oranges in the relevant market. Appellant relies upon additional evidence of such intent in Sunkist's (1) admitted purpose to control all the oranges it could get and utilize all of them in its own manufacturing facilities; (2) preventing Placentia Orange Distributors from fulfilling its promise to sell appellant 5,000 tons of oranges in 1957; (3) policing the Sunkist system to punish violators of the Sunkist "restrictive tying contracts"; (4) wrongful use of dual distribution by lowering single strength juice prices after competing manufacturers had purchased product oranges at prices established by Sunkist; (5) use of consignment contracts and its low 1956 bid (compared with its 1955 bid) to the Department of Agriculture.

Appellee recognizes in its brief that "the key determination by the trial court was that the appellant's evidence * * * established the fact that the relevant market for product oranges is a national market", but contends further that "under each of the tests which the courts have applied to determine whether or not a monopoly exists, the appellant's evidence conclusively established that there was no monopoly", and that with respect to each of the acts and incidents upon which appellant relies, Sunkist's conduct was "legitimate, cooperative activity and not undertaken in an unlawful manner or for an unlawful purpose". There is substantial evidence to support appellee's denial of each of the alleged acts of monopoly.

In determining the issues of monopolization and intent to monopolize, however, the evidence must be viewed as a whole. Even though the proof as to each of the specific acts may be insufficient in itself to establish wrongful use of monopoly power, the jury must look at the "whole picture", weigh the contradictory evidence and inferences and draw the "ultimate conclusion as to the facts". See Continental Ore Co. v. Union Carbide and Carbon Corp., supra, 370 U.S. at 699-701, and cases there cited.

As noted supra, in ruling on the directed verdict this court must give appellant "the advantage of every fair and reasonable intendment that the evidence can justify", and this is true "even though contrary inferences might reasonably be drawn". From a review of the record we conclude that there was sufficient evidence to submit to the jury the question of whether Sunkist wrongfully exercised its monopoly power and intentionally attempted to monopolize the trade in product oranges. We do not find that appellant has established any of the alleged acts of monopoly—only that viewing the evidence as a whole, it has made a prima facie case for the jury.[17]

Section 1 of the Capper-Volstead Act

Appellant contends that Sunkist is not a person "engaged in the production of agricultural products" under Section 1 of the Capper-Volstead Act because only 80.12% of its members are associations composed of fruit growers, while 4.97% are corporate growers, and 14.91% are private profit-makng corporations, individuals and partnerships which market through Sunkist the oranges they have purchased from growers.[18]

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[17] In Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., supra, the plaintiff relied upon some of the acts of monopoly here alleged. We upheld the submission of the case to the jury and the instructions given by the trial court. The Supreme Court granted certiorari limited to the issue of the immunity of interorganizational dealings among the three cooperatives from the conspiracy provisions of the antitrust law, and held that as a Capper-Volstead cooperative Sunkist was immune and that the case was erroneously submitted to the jury on the theory of a conspiracy under section 1 of the Act. Having held "erroneous one theory of liability upon which the general verdict may have rested • • • it is unnecessary • • • to explore the legality of the other theories." The Court said further that its decision "in no way detracts from earlier cases holding agricultural cooperatives liable for • • • monopolization", citing Maryland & Virginia Milk Producers Ass'n. v. United States, supra. Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., 370 U.S. at 20-30.

[18] A stipulation of the parties defining "association" in the Sunkist system recites that the members are classified into three major groups: (1) cooperative associations (80.12% by number and 82.34% by volume), (2) corporate growers (4.97% by number and 4.72% by

The district court concluded, and we think correctly, that under the decision of the Supreme Court in Sunkist Growers, Inc. v. Winckler & Smith Co., supra, Sunkist Growers, Inc., is a cooperative organized in compliance with Section 1 of the Capper-Volstead Act. It is true, as appellant argues, that this issue was not specifically raised in the Winckler case, but the Court did describe the Sunkist organization in detail. This was prior to the merger with Exchange Orange and Exchange Lemon, but the Court concluded that the 12,000 growers were "in practical effect and in the contemplation of the statutes one 'organization' or 'association' even though * * * formally organized * * * into three separate legal entities". (370 U.S. at 29). The Court also said in pertinent part:

> "The language of the Capper-Volstead Act is specific in permitting concerted efforts by farmers in the processing, preparing for market, and marketing of their products. And the legislative history of the Acts reveals several references to the Sunkist organization—then called the California Fruit Growers Exchange and numbering 11,000 members—including a suggestion by Senator Capper that this was a type of cooperative that would find 'definite legalization' under the legislation.
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> * * *
>
> "* * * That the packing is done by local associations, the advertising, sales, and traffic by divisions of the area association, and the processing by separate organizations does not in our opinion preclude these growers from being considered one organization or association

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volume), and (3) agency associations (14.91% by number and 12.94% by volume). The stipulation reads in part: "The Agency Association is normally a private corporation which owns and operates packing house facilities * * *. Such Agency Associations do not qualify as, nor do they claim to be, cooperative associations under section 1 of the Capper-Volstead Act. * * * The Agency Association does not itself participate in either the gain or loss involved in marketing fruit through Sunkist beyond the recovery of its costs and fixed fee for packing. Such Agency Association furnishes its facilities and services on an independent contract basis, wholly unrelated to the net returns from the sale of the product handled". (Clk. Tr. 1792-4).

for purposes of the Clayton and Capper-Volstead Acts." (370 U.S. at 28-29).

With respect to appellant's contention that Sunkist is not a qualified cooperative under Capper-Volstead by reason of its "corporate growers", this question was raised in the district court in United States v. Maryland & Virginia Milk Producers Ass'n, D. D.C. 1958, 167 F.Supp. 45, aff'd in part, reversed in part on other grounds, 362 U.S. 458, 80 S.Ct. 847, 4 L.Ed.2d 880. In that case the Government urged that the words "dairymen" and "farmers" should be restricted to natural persons. The district court held that it was immaterial "whether every member of the association is a natural person or a corporation." [19]

The Supreme Court did not comment on this portion of the district court's opinion, although it considered at length the scope of the immunity granted by Capper-Volstead. It is clear from the district court's opinion that the cooperative included corporate growers. It seems likely that this fact would have been considered by the Supreme Court if there were any question regarding the status of the association as a qualified cooperative by reason of the corporate growers.

1 U.S.C. 1 provides that in "determining the meaning of any act * * * of Congress, unless the context indicates otherwise * * * the words 'persons' and 'whoever' includes corporations * * * as well as individuals * * *".

We find nothing in the context of the Capper-Volstead Act to indicate that a corporation would not be considered a person within the meaning of the Act.

Does the fact that the so-called agency associations (comprising 14.91% by number and 12.94% by volume) constitute a "class" of membership prevent Sunkist from being a "person engaged in the production of agricultural prod-

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[19] The court said further:

"* * * The owner or operator of a dairy is a dairyman, whether he personally works on his dairy or has the work done by employees. So, too, the owner of a farm may be regarded as a farmer even though he devotes the major portion of his activities to other pursuits. * * *." (167 F.Supp. at 49).

ucts'' under section 1 of the Act? It will be noted from the stipulation of the parties (note 18) that the agency associations furnish their facilities and services on an independent contract basis, and that they do not participate in either gain or loss involved in marketing fruit through Sunkist. In other words, the growers receive full benefit of cooperative marketing through the agencies.

Associations organized under the Capper-Volstead Act ''may make the necessary contracts and agreements to effect'' the purposes of the Act, i.e., ''collectively processing, preparing for market, handling, and marketing'' their products. (7 U.S.C. 291). The agency associations supply services which the growers require (packing house facilities) in handling and marketing their products. The fact that the ''packing is done by local associations * * * and the processing by separate organizations'' does not preclude the growers from being considered one association for purposes of the Capper-Volstead Act. Sunkist Growers, Inc. v. Winckler & Smith Co. supra.

This is not a case where the agreement in question goes beyond the legitimate objects of processing and marketing. See e.g. United States v. Borden Co., 1939, 308 U.S. 188, 60 S.Ct. 182, 84 L.Ed. 181. The Court there recognized that agricultural producers ''may unite in preparing for market and in marketing their products'', and may ''make the contracts which are necessary for that collaboration'', but they are not authorized to conspire with others in restraint of trade. The Court said in part:

> ''In this instance, the conspiracy charged is not that of merely forming a collective association of producers to market their products but a conspiracy, or conspiracies, with major distributors and their allied groups, with labor officials, municipal officials, and others, in order to maintain artificial and non-competitive prices to be paid to all producers for all fluid milk produced in Illinois * * * and also to control 'the supply of fluid milk permitted to be brought to Chicago'.'' (308 U.S. at 205).

In Maryland & Virginia Milk Producers Association v. United States, supra, the court pointed out that the object of the conspiracy or combination was to eliminate a competitor and that the "allegations of the complaint * * charge *anticompetitive activities which are so far outside the 'legitimate objects' of a cooperative* that, if proved, they would constitute clear violations of § 2 of the Sherman Act * * *." (362 U.S. at 468). (Emphasis added). The Court said further:

> "The Embassy assets the Association acquired are useful in processing and marketing milk, and we may assume, as it is contended, that *their purchase simply for business use, without more, often would be permitted and would be lawful under the Capper-Volstead Act.* * * * The contract of purchase here, viewed in the context of all the evidence and findings, *was not one made merely to advance the Association's own permissible processing and marketing business;* it was entered into by both parties, according to the court's findings as we understand them, because of its usefulness as a weapon to restrain and suppress competitors and competition * * *." (362 U.S. at 471-72). (Emphasis added).

The independent contracts with the agency associations were for the legitimate objects of processing and marketing. Under the statute Sunkist could have entered into these contracts "with separate organizations". The mere fact that the agency associations constitute a "class" of membership does not in our opinion change the effect of the agency agreements or destroy the exempt status of the entire association.

Request for Leave to File Second Supplemental Complaint

Appellant next contends that the district court abused its discretion in denying plaintiff's motion to file a second supplemental complaint alleging facts occurring after the filing of the original complaint. In our opinion, upon remand of this case, appellant should be permitted to file the supplemental complaint. As the Court said in Texarkana

v. Arkansas Gas Co., 1939, 306 U.S. 188, 59 S.Ct. 448, 83 L.Ed. 598:

> "Where there is a good cause of action stated in the original bill, a supplemental bill setting up facts subsequently occurring which justifiies other or further relief is proper. If the original decree in the trial court had not been entered, this supplemental petition would simplify the controversy. We think this procedure is equally applicable after remand for further proceedings." (306 U.S. at 203).

Alleged Prejudice and Bias of Trial Judge

Finally appellant contends that the trial judge showed such marked prejudice against appellant that this court should order a new trial before another judge. In our opinion, the record does not support our issuance of the requested order. We are confident that the district court, upon remand and in the proper administration of its own functions, will insure that the retrial is conducted in the necessary atmosphere of total impartiality.

It Is Ordered that the judgment be reversed and the cause remanded to the district court for a new trial.

Ely, Circuit Judge (Dissenting in part):

I agree with the result reached by the majority, and I concur in its opinion except for that portion in which it is held that Sunkist falls within the exemption of section 1 of the Capper-Volstead Act, 7 U.S.C. § 291.

The principal reason offered by the majority in support of the view which I question is its asserted belief that the question was settled in *Sunkist v. Winckler & Smith Co.*, 370 U.S. 19, 8 L. Ed.2d 305, 82 Sup. Ct. 1130 (1062). I do not so interpret that decision. The particular issue was not presented to the Supreme Court, and it was not adjudicated. It was apparently conceded by the parties in *Winckler*, of which the appellant here was not one, that Sunkist was covered by the Capper-Volstead exemption. In the prior opinion of the Court of Appeals, reported at 284 F.2d 1 (9th

Cir. 1960), the only discussion of the exemption pertained to its extent, not to whether or not in was applicable. Furthermore, the Supreme Court, in granting certiorari, 368 U.S. 813 (1961), expressly limited its consideration to a single question, namely,

> "Where a group of citrus fruit *growers* form a cooperative organization for the purpose of collectively processing and marketing their fruit, and carry out those functions through the agency of three cooperative agricultural associations, each of which is basically *wholly owned and governed by those growers, and each of which is admittedly entitled to the exemption from the antitrust laws accorded to agricultural cooperatives by the Capper-Volstead Act* (7 U.S.C.A., sec., 291) — is an unlawful conspiracy, combination or agreement established under Sections 1 and 2 of the Sherman Act upon proof only that these *growers*, through the agency of these three cooperatives, *agreed among only themselves* with respect to the extent of the division of the function of processing between them or with respect to the price they would charge in the open market for the fruit and the by-products thereof processed and marketed by them?" (Emphasis supplied.)

Even if the issue had been determined by the Supreme Court in *Winckler*, the admitted nature of Sunkist's present organizational make-up is such that the exemption should no longer be held properly to apply. The privilege to act together in "exempt" associations is conferred only upon "persons engaged in the production of agricultural products...." 7 U.S.C. § 291. The plain import of the statutory language is that such an association must be composed *solely* of agricultural producers. Regardless of whether Sunkist was thus composed at the time of the *Winckler* decision in 1962, as the Supreme Court's order granting certiorari, *supra*, indicates, it is clear that the composition is no longer the same In our case, it is conceded that the so-called "agency association," which comprise almost 15% of the membership of the Sunkist organiaztion, are *not* growers or

producers.[1] The majority, in disregarding the significance of this factor, may have been influenced by the absence of decisions squarely holding that an association must be composed entirely of growers in order to qualify for the exemption. I point out that, while there are no decisions to that effect, there are none to the contrary. The opinions in a number of cases contain language which suggests the conclusion which I see to be plainly required by the statute's terms. Some of this language is as follows:

> "The persons to whom the Capper-Volstead Act applies are defined in § 1 as *producers of agricultural products.* . . . *They* are authorized to act together 'in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce' their products. . . .
>
> "The right of *these agricultural producers* thus to unite . . . cannot be deemed to authorize any combination or conspiracy *with other persons* in restraint of trade that these producers may see fit to devise." *United States v. Borden Co.*, 308 U.S. 188, 204-205, 84 L.Ed. 181, 60 Sup.Ct. 182 (1939) (Emphasis supplied.).
>
> "The chief defense set up by the Association was that, because of its being a cooperative composed *exclusively of dairy farmers,* § 6 of the Clayton Act and §§ 1 and 2 of the Capper-Volstead Act completely exempted and immunized it. . . . Accordingly the court dismissed the Sherman Act § 2 monopolization charge, where the Association was not alleged to have acted in combination with others, but upheld the right of the Government to go to trial on the Sherman Act § 3 and Clayton

[1] In its footnote 18, the majority refers to a portion of a stipulation wherein the parties agreed that the agency associations furnished to Sunkist their "facilities and services on an independent contract basis. . . ." The stipulation does *not* say that the associations were independent contractors. It recites that they were *"members"* of the Sunkist system. If the association were truly separate and independent, then that determination should be made, in the first instance, by the District Court. If they were not "members" of the Sunkist system, then, as I see it, the exemption of the Capper-Volstead Act is irrelevant to the issue of the propriety of Sunkist's dealings with them. *United States v. Borden Co., supra.*

Act § 7 charges *because they involved alleged activities with* the owners of Embassy and other *persons who were not agricultural producers.*'' *Milk Producers Assn. v. U.S.*, 362 U.S. 458, 461-462, 4 L.Ed.2d 880, 80 Sup.Ct 847 (1960) (Emphasis supplied.).

''Thus, the full effect of § 6 is that a *group of farmers* acting together . . . cannot be restrained. . . .

''The Capper-Volstead Act . . . extended § 6 of the Clayton Act exemption to capital stock agricultural cooperatives . . . the general philosophy of both was simply that *individual farmers* should be given . . . the same unified competitive advantage . . . available to businessmen. . . .'' *Id.*, 362 U.S. at 465-466 (Emphasis supplied.).

''[O]ur decision in no way detracts from earlier cases holding agricultural cooperatives liable for conspiracies with outside groups, *United States v Borden Co.*, 308 U.S. 188. . . .'' *Sunkist v. Winckler & Smith Co.*, 370 U.S 19, 30, 8 L.Ed.2d 305, 82 Sup.Ct. 1130 (1962).

''The Court concludes that a combination between two or more agricultural cooperatives to fix prices of their products is exempt from the antitrust laws *provided that no other person that is not such an organization or a member of such a group is a part of the combination.*'' *United States v. Maryland Cooperative Milk Pro.*, 145 F. Supp. 151 (D.D.C. 1956) (Emphasis supplied.).

''*Although* the Capper-Volstead Act . . . and the Clayton Act . . . give *some privileges to combinations* of agricultural *producers, a combination of producers and distributors* to eliminate competition and fix prices at successive stages in the marketing of an agricultural product *is not privileged.*'' *United States v. Maryland & Virginia Milk Pro. Ass'n*, 179 F.2d 426, 428 (D.C. Cir. 1949) (Emphasis supplied.).

''The exemptions are accorded and immunities are conferred on agricultural cooperatives and their activities. *When they* step outside of their field and *conspire with persons who are not producers of agricultural com-*

> *modities,* they are *beyond the scope of the exemptions.'' United States v. Maryland & Virginia Milk Pro. Ass'n,* 167 F.Supp. 45, 51-52 (D.D.C. 1958), *modified,* 362 U.S. 458, 4 L.Ed.2d 880, 80 Sup.Ct. 847 (1960) (Emphasis supplied.).

The persistent theme of the foregoing excerpts is that a cooperative, even though it otherwise qualifies for exemption under the Capper-Volstead Act, forfeits its exemption when it combines with non-producers. If that is so, then it is logically inconsistent to hold that a cooperative, while composed in part of non-producers, may yet qualify for the exemption.

APPENDIX B

Filed April 22, 1964, Clerk, U.S. District Court, Southern District of California

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IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

No. 333-58 HW

CASE-SWAYNE CO., INC., *Plaintiff,*

vs.

SUNKIST GROWERS, INC., *Defendant.*

PRETRAIL ORDER NO. ONE

On Monday, March 2, 1964, there came on regularly to be heard before the Honorable Harry C. Westover, United States District Judge, in Courtroom No. 5 in the United States Post Office and Courthouse, Los Angeles, California, a preliminary Pretrail Conference and the following motions and other matters:

1. Motion by plaintiff for order requiring production of documents pursuant to Rule 34 Federal Rules of Civil Procedure.
2. Defendant's Objection to Interrogatories.
3. Motion of defendant to set the Capper-Volstead issue for argument, to sever the Supplemental Complaint for trial, and to authorize a responsive pleading and

certain motions to the Supplemental Complaint, and to set the time therefor.

In connection with the foregoing items, the Court had before it various affidavits, memoranda of points and authorities, and statements of reasons.

In addition, the Court had before it the joint Stipulation of Relevant Facts and Material Issues of Law Relative to Issue Raised by Capper-Volstead Defense, together with the briefs filed by the parties on said issue. The parties stipulated in open court, through their respective counsel, that the facts relating to the Capper-Volstead defense for the period covered by the Supplemental Complaint were in all material respects the same as the facts stated in the above stipulation, with the exception of the fact that in 1958 Sunkist, Exchange Orange and Exchange Lemon were all merged into one organization, Sunkist Growers, Inc., and for that reason the ruling of the Court upon the Capper-Volstead defense should apply to the entire period covered in the original and supplemental complaints. The Court approved said stipulation.

The Court heard oral argument upon the issues relating to the Capper-Volstead defense.

After reviewing all of the above documents and hearing oral arguments in open court, and good cause therefor appearing, the Court now makes the following orders, to constitute Pretrail Order No. One in the within cause:

1. The Court determines and rules that at all periods of time covered by the original and supplemental complaints on file herein, Sunkist Growers, Inc., Exchange Orange and Exchange Lemon have complied with, and have constituted one duly qualified agricultural cooperative under Section 1 of the Capper-Volstead Act, 7 U.S.C.A. Section 291.

2. The Court determines and rules that during the period covered by the original and supplemental complaints, an illegal conspiracy in violation of the Sherman Act could not exist solely between Sunkist Growers, Inc., Exchange Orange and Exchange Lemon, nor between any two of them, or between Sunkist Growers, Inc., and any other part of

the Sunkist system (including District Exchanges, Associations and growers affiliated therewith).

3. All motions before the Court are denied without prejudice to their removal at a later date.

4. All objections to interrogatories and objections to the motion to produce documents are sustained without prejudice to resubmitting the interrogatories and motions at a later date.

5. By April 1, 1964, the plaintiff is to file with the Court and serve upon the defendant a statement of its theory of the liability in this case, in accordance with its declaration in open court that this action is based on claimed monopolization. The plaintiff may, if it so chooses, incorporate by appropriate reference documents or parts thereof which it has previously filed in this case. The Court contemplates that after said statement is filed, it will request the plaintiff to file a statement of the evidence which supports said theory of liability. Thereafter, if necessary, the defendant will be ordered to file a statement of its theory of nonliability.

6. Both parties are ordered to serve and file their opening statements to the jury by June 1, 1964, which statements shall not take more than thirty minutes to state to the jury. The Court will permit counsel to depart from the phraseology contained in said statements, but not from the general subject matter thereof.

7. The Court orders each party to file its proposed jury instructions, accompanied by citations of authority for each instruction, by June 1, 1964.

8. The Court orders that all documents necessary to bring this case to trial be filed with the Court by a date to be later fixed by the Court. Each party shall prepare and file an index of all documents submitted by it.

9. The Court directs the defendant to prepare the pretrial order in this case. After it has been submitted to counsel for the plaintiff, the plaintiff may file objections with the Court, and if the Court deems that a hearing is necessary, the hearing will be set and the Court will determine the pretrial order.

10. The Court sets the within cause for trial at 10:00 a.m. on Monday, November 9, 1964, in Courtroom No. 5 in the United States Post Office and Courthouse, in the City of Los Angeles, County of Los Angeles, State of California.

11. The Court orders that at the trial of this cause the issue of liability shall be tried first and separately from the issue of damages and thereafter, if the jury finds for the plaintiff on the issue of liability, the trial of the issue of damages shall take place. Said trial shall be before the same jury that tried the issue of liability, unless the parties stipulate that it may be before a different jury.

DATED: April 21st, 1964.

HARRY C. WESTOVER,
United States District Judge.

APPROVED AS TO FORM AND CONTENT:

W. GLENN HARMON
WILLIAM H. HENDERSON
By WILLIAM H. HENDERSON,
Attorneys for Plaintiff.

APPENDIX C

Filed Mar. 1, 1965. Clerk, U. S. District Court, Southern District of California. By ——, Deputy.

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

No. 333-58—HW

CASE SWAYNE CO., INC., *Plaintiff*,

vs.

SUNKIST GROWERS, INC., *Defendant*.

MEMORANDUM AND ORDER GRANTING MOTION FOR DIRECTED VERDICT

Two motions are now pending for determination in the above-entitled action:

1. Motion for Directed Verdict, filed on behalf of defendant.
2. Motion for Mistrial, filed on behalf of plaintiff.

For the reasons hereinafter stated this Court is of the opinion the Motion for Mistrial should be denied and the Motion for Directed Verdict granted.

Defendant Sunkist Growers, Inc. (hereinafter designated as Sunkist) is a mutual association of citrus growers. It is a qualified Capper-Volstead cooperative. Approximately 12,000 citrus growers in Southern California and Arizona comprise the organization. Each member of the cooperative is a member of a Sunkist Packing House.

At the time of harvesting the citrus crop the packing house sends a crew into the grower's grove to pick the fruit and transport it to the packing house. There the fruit is washed, cleaned, and segregated. Most citrus fruit grown in the Southern California-Arizona area is forwarded to the fresh fruit market not only in Southern California and Ari-

zona but also in all other states of the Union and in foreign countries.

Years ago there was no market for fruit not required by the fresh fruit market, and as a consequence the remainder of the fruit (at that time termed "culls") was destroyed by the packing houses. But with the development of the citrus juice industry demand arose for fruit not consumed by the fresh fruit markets, with the result that culls (now designated as "excess fruit") could be sold to processors to convert into juice or other by-products.

Plaintiff is a corporation which for many years has been processing excess oranges, making from them single strength orange juice or other by-products. Single strength orange juice is the natural juice obtained from the fruit. It is neither diluted nor concentrated in any manner. It is sealed in cans by the processor and sold on the market without refrigeration.

In the beginning of its processing activity plaintiff had no difficulty in obtaining at a reasonable price sufficient fruit for its needs. But when it was demonstrated that conversion of excess fruit into juice and other citrus by-products was profitable. Sunkist decided to process its own fruit and for that purpose organized Exchange Orange Products Company and Exchange Lemon Products Company.

Exchange Orange Products Company was organized to process the excess oranges of the various Sunkist Packing Houses. Exchange Lemon Products Company was organized to process lemons and grapefruit grown by Sunkist members. As time went on and as Exchange Orange and Exchange Lemon developed processing capabilities, more and more excess fruit from Sunkist packing houses was channeled to Exchange Orange and Exchange Lemon until, at the present time, practically no excess Sunkist fruit is sold to independent processors.

Plaintiff attempted to obtained from other mutual citrus associations its requirement of fruit to process, only to find that such associations had entered into individual contracts with other processors; hence plaintiff was able to obtain very little fruit supply from mutual associations.

Because of plaintiff's inability to acquire excess fruit for

its processing plant, in April, 1958, it filed the above-entitled action against Sunkist, The Exchange Orange Products Company and The Exchange Lemon Products Company, on the theory that the three defendants had combined and entered into contracts, and had conspired, to restrain trade and commerce among the several states in by-product citrus products of the Southern California-Arizona area, and that the defendants had monopolized or attempted to monopolize by-product citrus fruits in the Southern California-Arizona area.

Winckler & Smith Citrus Products Co. had filed a similar action in the District Court for the Southern District of California, Southern Division (San Diego), naming the same defendants. The Winckler case was tried to a jury, and the jury found that a conspiracy did exist between Sunkist and Exchange Orange and Exchange Lemon; and the jury assessed a very substantial verdict against them.

On appeal to the United States Court of Appeals for the Ninth Circuit (281 F.2d 1, decided September 30, 1960) the verdict was affirmed on the issue of liability. Upon certiorari to the Supreme Court of the United States (*Sunkist* v. *Winckler & Smith Co.*, 370 U.S. 19), that Court reversed, stating at page 27:

> "We are squarely presented then, with the question of whether Sunkist, Exchange Orange, and Exchange Lemon—the three legal entities formed by these 12,000 growers—can be considered independent parties for the purposes of the conspiracy provisions of §§ 1 and 2 of the Sherman Act. We conclude not. Section 6 of the Clayton Act provides, inter alia, that agricultural organizations instituted for the purposes of mutual help shall not be held or construed to be illegal combinations or conspiracies in restraint of trade under the antitrust laws. * * *.
>
> "* * * *.
>
> "* * *, we feel that the 12,000 growers here involved are in practical effect and in the contemplation of the statutes one 'organization' or 'association' even though they have formally organized themselves into three separate legal entities.* * *."

Subsequent to the above-quoted decision of May 28, 1962, plaintiff in the action at bar filed herein an amended or supplemental complaint, in which the theory of consipiracy was abandoned; but monopoly and attempted monopoly were realleged. At the trial of the within action before a jury the following facts were established:

1. That Sunkist Growers, Inc. controlled approximately 70% of the citrus fruit grown within the Southern California-Arizona area.

That approximately 12,000 citrus fruit growers annually signed one-year contracts with Sunkist, agreeing to sell fruit through the Sunkist organization.

That each year the contracts were renewed by any grower who wished to renew; and each and every grower had the right to withdraw from the Sunkist organization if he so desired.

That the one-year contract provided that if, during the term of the contract, a grower did not abide by his contract and handle fruit through Sunkist, sanctions might be imposed upon the grower so breaching the contract.

That occasionally a grower failed to sell his fruit through Sunkist during his contract term but sold the fruit to others, and sanctions were imposed upon the breaching grower by the Sunkist organization.

2. That upon the establishment of Exchange Orange and Exchange Lemon, Sunkist commenced to process its excess fruit. Fruit not so processed was sold to independent processors, such as the plaintiff in this action.

That Sunkist had excess fruit available for sale to independent processors only when it was unable to process its own fruit.

That for several years Sunkist sold its excess fruit to independent processors by a bid system. That all independent processors, including plaintiff, were invited to present bids for fruit to be sold.

3. That the Sunkist trade mark or trade name was a valuable asset, and defendant had spent large sums in establishing its trade mark or trade name. That the

trade mark or trade name could be used by those growers selling fruit to Sunkist packing houses, but that if a Sunkist member grower withdrew from the organization or failed to abide by the contract terms, he was no longer permitted to use the trade name or trade mark "Sunkist."

4. That Sunkist employees observed operations of member growers to make certain that such growers handled their crops through only the Sunkist organization, and if and when discovery was made that a member grower sold fruit contrary to his contract with Sunkist, a report was made to Sunkist and, in certain instances, penalties were imposed upon the violating grower.

5. That the Department of Agriculture, pursuant to the school lunch program, requested bids for single strength orange juice; that one year Sunkist bid but did not receive the contract and, in another year, Sunkist bid and was awarded the contract.

6. That Sunkist made a large profit from sale of citrus fruit.

Although (to establish its claim of monopoly or attempted monopoly) plaintiff alleges that Sunkist practiced certain "predatory acts", not any of the acts complained of by plaintiff was in itself illegal.

It is plaintiff's contention that inasmuch as Sunkist controlled approximately 70% of all citrus groves in the Southern California-Arizona area, that in itself created monopoly. Size alone is not sufficient to establish monopoly; and any grower within the Southern California-Arizona area was free to join the Sunkist organization if he so desired.

There is no evidence before the Court to indicate that any grower was forced to join the Sunkist cooperative against his will. Joining Sunkist was an entirely voluntary act by the individual grower and, so far as the evidence disclosed, a grower joined the Sunkist organization solely because he felt he could obtain a better return from his crop than by selling it individually or by becoming a member of any other cooperative.

Plaintiff complains that Sunkist sold most of its crop to the fresh fruit market; consequently, more fruit channeled to the fresh fruit market meant less fruit available for processing.

The Sunkist organization belonged to the growers. It was the duty of Sunkist to sell the crops at the highest price it could obtain for its member growers.

Plaintiff complains that after Exchange Orange and Exchange Lemon were established Sunkist could not process all of its excess fruit through these two organizations and entered into contracts with third parties for the processing of excess fruit. This practice, plaintiff alleges, is an indication that defendant was attempting to obtain a monopoly.

But what Sunkist could do itself it could also accomplish through an agent, and there is nothing to indicate anything unusual or illegal in the arrangements Sunkist made with other processors to handle Sunkist's excess fruit.

Plaintiff complains of the so-called espionage system allegedly maintained by Sunkist, contending that by this "espionage" plaintiff was precluded from purchasing oranges from Sunkist growers.

If the contracts entered into each year by Sunkist with the individual growers were legal (and there is nothing in the record to indicate they were illegal), then Sunkist had the right to insist upon compliance with the contract terms; and so far as is apparent to this Court there is nothing illegal in a contracting party's insistence upon performance of a contract in accordance with its terms. And, if the contract provided for sanctions in the event of breach, there was nothing illegal in Sunkist's assertion of the sanctions upon a defaulting grower.

Plaintiff contends the bid-system sale of excess fruit by Sunkist indicated an attempt to establish a monopoly; that because of such bid system Sunkist was able to obtain higher prices for the fruit sold. No evidence was adduced at the trial to indicate the bid system was unlawful or had been unlawfully pursued. All processors were treated alike —bids were solicited from all processors; but plaintiff refused to bid.

Plaintiff has premised its amended or supplemental com-

plaint upon the theory of monopoly or attempted monopoly. The best definition we find of monopoly is "lack of competition." Plaintiff would limit the area of alleged monopoly or attempted monopoly (or lack of competition) to the Southern California-Arizona area; but to ascertain whether a monopoly or attempted monopoly did in fact exist, as contended by plaintiff, consideration must be given to the citrus market as a whole. Plaintiff would ignore national and foreign markets in its attempt to establish monopoly by Sunkist.

Evidence at the trial indicated the great majority of citrus grown in Southern California and Arizona goes into the fresh fruit markets. It was established that in Florida, however, the greater amount of oranges grown there went to the citrus products market. Evidence also disclosed that fresh fruit from California, Arizona, and Florida competed on the eastern and foreign markets.

Plaintiff charges defendants with monopoly of excess citrus fruit. If the area of competition could be limited to the Southern California-Arizona area only, there is no question that Sunkist dominated approximately 70% of the citrus produced in that geographic area. But evidence in the case established that the quantity of fruit produced in Florida had a direct bearing on prices of citrus produced in California and that, in fact, the major factor affecting prices of oranges in California was the orange harvest in Florida.

Although plaintiff would limit the market to Southern California-Arizona, evidence established there was one, national, citrus market, and that whatever happened in Florida directly affected prices in California and vice versa. Prices paid for oranges in California depended substantially upon the price for which oranges were sold in Florida.

The evidence indicated it was possible for processors in Florida to make single strength orange juice, can it, ship it to California, and sell it at the same price as (or at a price lower han) the Southern California-Arizona produced juice. The testimony was that Florida processors of single strength orange juice could assimilate transportation costs from Florida to California and sell their product in competition with single strength orange juice made within the

Southern California-Arizona area. This was possible because of the lower price for which Florida fruit could be purchased.

The Court must conclude there was competition in the orange juice industry between the Southern California-Arizona area and Florida. Evidence indicated the price paid for Florida oranges was the dominant factor in determining the price for which single strength orange juice could be sold to the ultimate consumer.

It further appears that there is also competition between single strength orange juice and orange juice concentrates. Neither of the parties in the action at bar were producers of concentrated or frozen juices. However, frozen juice is in direct competition with single strength orange juice.

The Court believes this case at bar to be similar to *United States v. du Pont & Co.*, 351 U.S. 377, in which the Supreme Court of the United States considered the question of competition of cellophane. The Government had filed an action against du Pont, alleging monopoly. The Court said, at page 399:

> "But, despite cellophane's advantages, it has to meet competition from other materials in every one of its uses. * * *. Thus, cellophane shares the packaging market with others."

And at page 404:

> "The 'market' which one must study to determine when a producer has monopoly power will vary with the part of commerce under consideration. The tests are constant. The market is composed of products that have reasonable interchangeability for the purposes for which they are produced—price, use and qualities considered. While the application of the tests remains uncertain, it seems to us that du Pont should not be found to monopolize cellophane when that product has the competition and interchangeability with other wrappings that this record shows."

This Court is consequently of the opinion that processors of single strength orange juice in Southern California-Arizona had to meet competition of Florida single strength orange juice as well as the competition of juice concentrates.

At the conclusion of plaintiff's presentation of its case, defendant moved for dismissal under Rule 41 (b) of the Federal Rules of Civil Procedure or for a directed verdict under Rule 50 (a). But before entry of judgment counsel for defendant called to the Court's attention the amendment to Rule 41 (b), which amendment makes the rule applicable solely to cases tried without a jury; that the motion for dismissal under Rule 41 (b) was, therefore, in error, and defedant's motion for directed verdict under Rule 50 (a) was renewed.

As no judgment has yet been entered in this action, the Court is of the opinion the Motion for Directed Verdict now pending must be granted.

Rule 50 (a) of the Federal Rules of Civil Procedure provides:

> "* * *. The order of the court granting a motion for a directed verdict is effective without any assessment of the jury."

Judgment will be entered accordingly.
Dated this 1st day of March, 1965.

HARRY C. WESTOVER,
United States District Judge.

APPENDIX D

FCS BULLETIN 1
FARMER COOPERATIVES
in the United States
FARMER COOPERATIVE SERVICE • U.S. DEPARTMENT OF AGRICULTURE

Agricultural Cooperatives Have Legal Foundations

By Raymond J. Mischler*
Office of the General Counsel, U.S. Department of Agriculture

Cooperatives have had a considerable legal history. They now operate under well-defined Federal and State statutes, and their Federal income tax status has been defined by statute and regulations.

Federal Statutes Confer Rights

The Federal statutes do not contain a general definition of an agricultural cooperative association. In the Capper-Volstead Act, the Agricultural Marketing Act of 1929, as amended, and the Internal Revenue Code, however, agricultural cooperative associations are defined for the special purposes of such Acts. These definitions, although similar in some respects, are not identical. In addition, such associations are mentioned, but not defined, in several other Federal statutes.

The Capper-Volstead Act

The Capper-Volstead Act[5] was enacted to resolve any doubt regarding the right of producers of agricultural products to unite and act through a cooperative association to handle and market their products without violating the antitrust laws.

The original Sherman Anitrust Act[6] did not contain any reference to cooperative associations. When this Act was amended by the Clayton Act[7] in 1914, section 6 of the Act ostensibly assured labor and agricultural associations of the right to exist without violating the antitrust laws. But this section referred only to nonstock associations and was gen-

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* Now deceased.

[5] Approved February 22, 1922; 7 U.S.C. 291-292.

[6] 15 U.S.C. 1, *et seq.*

[7] 15 U.S.C. 12.

erally no considered a guarantee to farmers of the right to form marketing cooperatives.

Thus, the Capper-Volstead Act was passed to make it clear that the elimination of competition between individual agricultural producers, which occurs when they act together through a cooperative association, would not in and of itself constitute an antitrust violation.

The Capper-Volstead Act by its terms refers exclusively to the marketing functions of farmer cooperatives, and does not include purchasing or service functions. The United States Supreme Court has held that the Act confers no special immunity on a cooperative association which would not exist for any other business entity under like conditions.[8]

For an agricultural cooperative to come within the Capper-Volstead Act, it must be composed of "persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers;" must operate on a mutual basis for the benefit of its members as producers; and must conform to one or both of these requirements:

1. No member of the association may have more than one vote, or
2. The association may not pay dividends on stock or membership capital in excess of 8 percent per year; and must not deal in the products of nonmembers to an amount greater in value than such as are handled by it for members.

When the Secretary of Agriculture has reason to believe that an association within the scope of the Act monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced as a result, he may then start an administrative proceeding against the association. If, following a hearing, he finds that the facts are as suspected, he may issue an order directing the association to cease and desist from monpolization or restraint of trade. The Attorney General

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[8] *United States* v. *Maryland and Virginia Milk Producers Assoc., Inc.*, 362 U.S. 458 (1960); *United States* v. *Borden Co.*, 308 U.S. 188 (1933).

may institute court proceedings to enforce the Secretary's order.

The Agricultural Marketing Act

The Agricultural Marketing Act of 1929, as amended,[9] defines a "cooperative association" which is eligible to borrow from a bank cooperatives.[10] This definition follows the Capper-Volstead Act definition on the requirement that the association be composed of agricultural producers, the ration of nonmember business to member business, and the limitation of dividends on stock or voting rights or both.

However, the definition is much broader than the one in the Capper-Volstead Act in that it covers cooperative purchasing associations and those engaged in furnishing "farm business services."

It also provides that all business transacted by any cooperative association for or on behalf of the United States shall be disregarded in applying the nonmember-to-member business ratio.

The Internal Revenue Code [11] contains special provisions on the tax treatment of certain farmer associations which qualify thereunder and other cooperatives covered thereby. The requirements for qualification differ in some respects from those contained in the two definitions discussed previously. Since this subject is covevred in more detail in the next section of this publication, it will not be discussed further here.

The Cooperative Marketing Act

The Cooperative Marketing Act of 1926 [12] directed the establishment of a division in the Department of Agriculture to "render service to associations of producers of agricultural products, and federations and subsidiaries thereof,

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[9] 12 U.S.C. 1141j.

[10] The Agricultural Marketing Act definition is also used in determining the cooperative associations which are to be exempt from certain requirements of the Federal Motor Carrier Act of 1935, 49 U.S.C. 301, 303.

[11] 26 U.S.C. 501(c) (15) and (16), 521, 1381-1383 inc.

[12] 7 U.S.C. 451-457.

engaged in the cooperative marketing of agricultural products, including processing, warehousing, manufacturing, storage, the cooperative purchasing of farm supplies, credit, insurance, and other cooperative activities."

Under the Act of 1926, the U.S. Department of Agriculture, through the Farmer Cooperative Service, is authorized:

1. To acquire, analyze, and disseminate economic, statistical, and historical information regarding the progress, organization, and business methods of cooperative associations in the United States and foreign countries.

2. To conduct studies of the economic, legal, financial, social, and other phases of cooperation, and publish the results thereof. Such studies shall include the analyses of the organization, operation, financial, and merchandising problems of cooperative associations.

3. To make surveys and analyses, if deemed advisable, of the accounts and business practices of representative cooperative associations upon their request; to report to the association so surveyed the results thereof; and, with the consent of the association so surveyed, to publish summaries of the results of such surveys, together with similar facts, for the guidance of cooperative associations and for the purpose of assisting cooperative associations and developing methods of business and market analysis.

4. To confer and advise with committees or groups of producers, if deemed advisable, that may be desirous of forming a cooperative association and to make an economic survey and analysis of the facts surrounding the production and marketing of the agricultural product or products which the association, if formed, would handle or market.

5. To acquire from all available sources information concerning crop prospects, supply, demand, current receipts, exports, imports, and prices of the agricultural products handled or marketed by cooperative associations, and to employ qualified commodity marketing specialists to summarize and analyze this information and disseminate the same among cooperative associations and others.

6. To promote the knowledge of cooperative principles and practices and to cooperate, in promoting such knowl-

edge, with educational and marketing agencies, cooperative associations and others.

7. To make such special studies, in the United States and foreign countries, and to acquire and disseminate such information and findings as may be useful in the development and practice of cooperation.

Brief references to other important Federal statutes which specifically mention farmer cooperatives follow.

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Federal Income Tax Status Is Defined

The Internal Revenue Code of 1954, as amended by the Revenue Act of 1962, contains special provisions on the tax treatment of (1) certain farmers' associations which qualify thereunder and (2) all corporations operating on a cooperative basis to which the revised statute specifically applies.

Those farmer cooperatives qualifying under section 521 of the Code generally operate so as to have little or no taxable income. Associations which do not qualify (and about half of the existing associations do not) are liable for income tax on receipts devoted to the payment of a return on capital and on receipts which they do not pay to patrons as true patronage refunds in the manner prescribed by the Code.

The discussion will point out some of the more important phases of the statutes and regulations on this subject.

For Marketing and Farm Supply Cooperatives

The pertinent sections of the Internal Revenue Code of 1954 relating to marketing and supply associations are sections 521, 1381, 1382, and 1383 (the latter three sections comprising Subchapter T of the Code added by the Revenue Act of 1962):

If a cooperative can meet the requirements specified in section 521, it can qualify for the tax treatment provided in Part I of Subchapter T. The chief requirements for such qualification are these:

1. It must be a farmer, fruit grower, or like association organized and operated on a cooperative basis to (a) market the products of members or other producers, or (b) purchase supplies and equipment for the use of members or other persons.

2. Substantially all its stock (other than preferred nonvoting stock) must be owned by producers marketing products or purchasing supplies through it if it is organized on a capital share basis.

3. The dividend rate on capital shares must not exceed the legal rate of interest in the State of incorporation, or

8 percent a year, whichever is the greater, based upon the value of the consideration for which the capital share was issued.

4. Financial reserves are restricted to those required by State laws or those that are reasonable and necessary, and must be allocated to patrons unless the cooperative includes them in computing taxable income.

5. The business with nonmembers may not exceed 50 percent of the cooperative's total business, and the purchasing for persons who are neither members nor producers may not exceed 15 percent of the cooperative's total purchasing.

6. Nonmembers are to be treated the same as members in such business transactions as pricing, pooling, or payment of sales proceeds, in prices of supplies and equipment in fees charged for services, or in the allocation of patronage refunds to the accounts of patrons.

7. Permanent records of the patronage and equity interests of all members and nonmembers must be maintained.

8. The legal structure of the organization must be cooperative in character and contain no provisions inconsistent with these requirements, and the association must be actually operated in the manner and for the purposes outlined in the requirements.

In computing its net income, an organization qualifying under section 521 may, in addition to all other deductions authorized by law, deduct— . . .

1. Amounts paid by it during the taxable year as dividends on capital stock; and

2. Amounts paid to patrons, or allocated and disclosed to each patron in the manner authorized in Subchapter T, with respect to income during the taxable year which is derived from sources other than patronage (as, for example, rents received, investment income, gain on sale of depreciable property and capital assets, and income from business done with or for the United States Government).

Such an association also may exclude from gross income patronage refunds (called "patronage dividends" in the

Code) returned in the form and within the time prescribed in Subchapter T.

A cooperative which does not qualify under section 521, but which is covered by the definition is Subchapter T, files a regular corporate income tax return but is entitled to exclude from its gross income patronage refunds paid in the form and within the time prescribed in Subchapter T, under the same rules as are applicable to the so-called "exempt" cooperative.

In order for cooperatives to exclude patronage refunds they must be paid in cash or in "qualified written notices of allocation" on which the patron has (1) the option to redeem the allocation in cash during a 90-day period after issuance or (2) consented to treat the refund as his income. The patron may give this consent individually in writing, the cooperative may by its bylaws require members to give this consent, or the patrons may consent by endorsing and cashing a check representing at least 20 percent of the total patronage refund. In any event, an allocation is deductible only if at least 20 percent is paid in cash.

If cooperatives to which Subchapter T applies do not pay their patronage refunds in the form prescribed, they must include such "nonqualified allocations" in their income in the year issued. However, a deduction may be taken in the year in which a nonqualified allocation is redeemed in cash. If at that time the cooperative is not able to make use of a deduction, a refund may be obtained with respect to the taxes paid on this amount in the year the allocation was made.

Under the law, any patronage refund or other distribution by an exempt cooperative which the cooperative may exclude from its income must be included in the income of the patron when he receives notice of it, if the amount arises from business activity of the patron. Also, distributions in redemptions of "nonqualified allocations" can be included in the year received if they affect the patron's income from a business and do not arise out of personal living items. Thus, the principle of a single tax currently on taxable income generated through cooperative enterprise was established by this legislation.

Any dividends on capital from a so-called "exempt" cooperative are fully taxable to the shareholder (that is, not subject to the dividend credit which applies generally).

For Corporations Financing Crop Operations

Paragraph (16) of section 501 (c) of the Internal Revenue Code of 1954 provides for exemption from Federal income tax of certain corporations set up for the purpose of financing crop operations by organizations which qualify under section 521. It reads as follows:

(16) Corporations organized by an association subject to part III of this subchapter or members thereof, for the purpose of financing the ordinary crop operations of such members or other producers and operated in conjunction with such association. Exemption shall not be denied any such corporation because it has capital stock, if the dividend rate of such stock is fixed at not to exceed the legal rate of interest in the State of incorporation or 8 percent per annum, whichever is greater, on the value of the consideration for which the stock was issued, and if substantially all such stock (other than nonvoting preferred stock, the owners of which are not entitled or permitted to participate, directly or indirectly, in the profits of the corporation, on dissolution or otherwise, beyond the fixed dividends) is owned by such association, or members thereof; nor shall exemption be denied any such corporation because there is accumulated and maintained by it a reserve required by State law or a reasonable reserve for any necessary purpose.

For Mutual Insurance Companies or Associations

Farmer mutual insurance companies or associations meeting the provisions set forth in paragraph (15) of section 501(c) of the Internal Revenue Code may qualify for exemption. This paragraph (15) provides exemption for mutual insurance companies or associations other than life or marine (including interinsurers and reciprocal underwriters) if the gross amount received during the taxable year from interest, dividends, rents, and premiums (including deposits and assessments) does not exceed $150,000.

Steps Necessary To Qualify

If a farmer cooperative desires to qualify under section 521, the regulations require it to request a "letter of exemption."

It may obtain such a letter by filing an application on Form 1028 with the District Director of Internal Revenue Service for the district in which its principal place of business is located. To establish qualification under paragraphs (15) and (16) of section 501(c), quoted above, the organization must file the information required by the applicable sections of the regulations of the Internal Revenue Service.

Once the letter is granted it is not necessary to refile unless substantial changes occur in the organization or its activities. However, any such changes are required to be reported. This is done in connection with the annual returns, discussed below.

Exemption continues only so long as the legal setup and the operating methods are in accord with the requirements of the applicable statute and regulations. Hence a change in status can occur even though the letter of exemption is not withdrawn or cancelled.

Returns Required of Cooperatives

Annual returns by all cooperatives subject to Part I of Subchapter T are required to be filed by the 15th day of the 9th month following the close of the taxable (calendar or fiscal) year of the cooperative.

Cooperatives qualified under section 521 file on Form 990-C, and all others use the standard corporate Form 1120. Cooperatives *not* qualified under 521 can use the longer filing period only on a showing that they are obligated to—or have actually—paid at least 50 percent of their patrons' net margins as patronage refunds.

Information returns by organizations exempt under 501(c) must be filed annually by the 15th day of the 5th month following the close of the organization's annual accounting period.

All farmer cooperatives must report to the Internal Reve-

nue Service all payments of interest, dividends, and patronage dividends (as these terms are defined in the Code) of $10 or more a year to any one person and also send a statement of these payments to the recipient thereof indicating the amount in each category reported. The statements must show the name, address, and account number of the recipient. Heavy penalties are imposed for failure to make these reports.

The reports required are (1) in the case of dividends and interest, to be made with respect to amounts paid on or after January 1, 1963; and (2) in the case of patronage dividends [refunds], with respect to amounts paid on or after the first day of the first taxable year of the cooperative, beginning on or after January 1, 1963. The reports must be furnished to the Government on or before February 28 of the year following the calendar year for which the return is made; the statement must be sent to the payee on or before January 31 of that year.

Exemption From Stamp Tax

An association qualifying under section 521 is exempt from payment of a documentary stamp tax on the issue or transfer of shares or certificates of stock and certificates of indebtedness (See section 4382 (a)(3) of the Internal Revenue Code of 1954).

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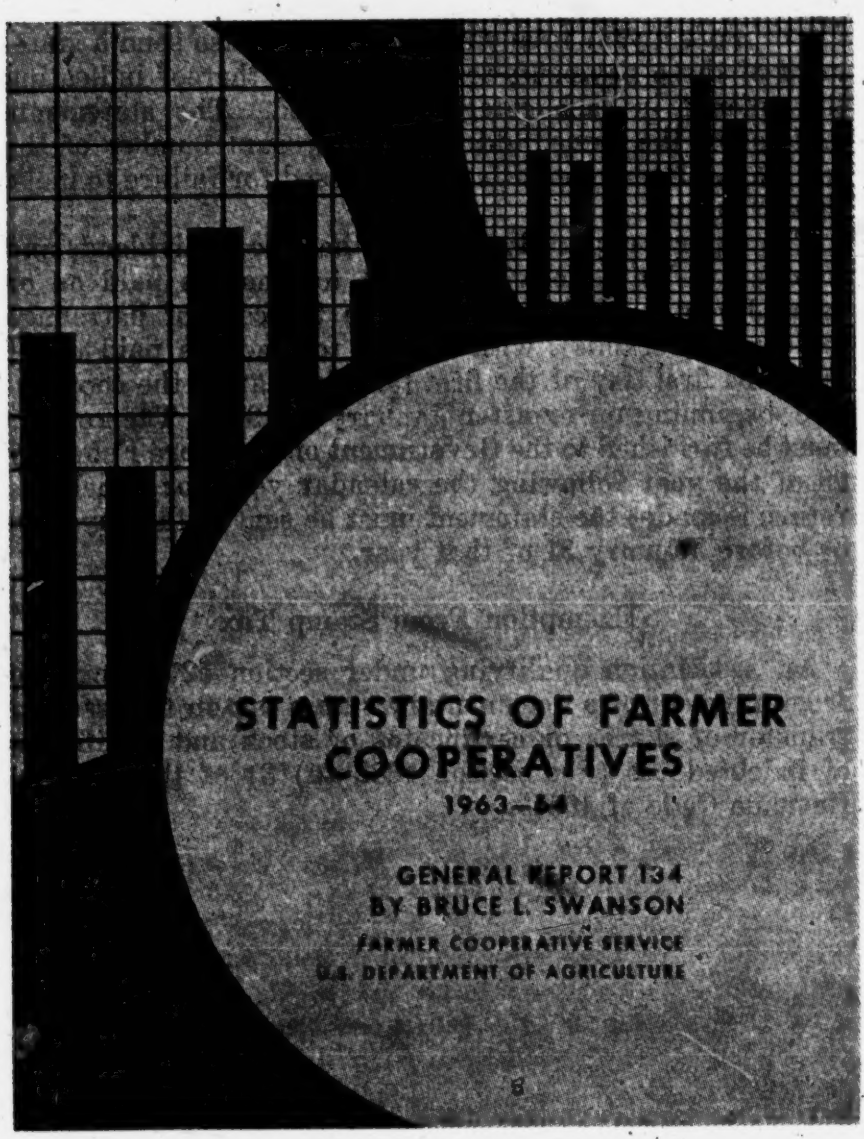
STATISTICS OF FARMER COOPERATIVES
1963–64
GENERAL REPORT 134
BY BRUCE L. SWANSON
FARMER COOPERATIVE SERVICE
U.S. DEPARTMENT OF AGRICULTURE

Table 1.—Estimated gross and net volume of business of marketing, farm-supply, and related-service [1] cooperatives, and percentage of total, 1950-51 to 1963-64

Period [2]	Gross volume (includes intercooperative business)				Net volume (excludes intercooperative business)			
	Farm products	Farm supplies	Related services	Total	Farm products	Farm supplies	Related services	Total
	$1,000				$1,000			
1950–51	7,984,777	2,437,521	99,958	10,522,256	6,361,766	1,685,413	99,958	8,147,137
1951–52	9,260,697	2,762,095	114,480	12,137,272	7,376,684	1,918,723	114,480	9,409,887
1952–53	9,294,945	2,866,908	141,750	12,303,603	7,365,795	2,013,768	141,750	9,521,313
1953–54	9,198,727	2,841,727	157,802	12,198,256	7,338,786	1,978,052	157,802	9,474,640
1954–55	9,347,913	2,921,859	195,522	12,465,294	7,424,743	2,021,617	195,522	9,641,882
1955–56	9,514,387	2,972,696	214,880	12,701,963	7,495,159	2,046,086	214,880	9,756,125
1956–57	10,110,115	3,152,985	234,629	13,497,729	7,998,887	2,145,939	234,629	10,379,455
1957–58	10,538,742	3,269,400	246,964	14,055,106	8,318,448	2,187,490	246,964	10,752,902
1958–59	11,412,483	3,549,922	272,866	15,235,271	9,103,089	2,371,061	272,866	11,747,016
1959–60	11,688,409	3,659,969	298,177	15,646,555	9,328,914	2,408,157	298,177	12,036,248
1960–61	12,143,722	3,744,711	305,600	16,194,033	9,631,247	2,472,286	305,600	12,409,133
1961–62	12,992,656	3,914,849	302,102	17,209,607	10,160,364	2,561,338	302,102	13,023,804
1962–63	13,893,463	4,145,263	303,281	18,342,007	10,834,165	2,704,400	303,281	13,841,846
1963–64 [3]	14,557,182	4,393,864	313,103	19,264,149	11,233,698	2,831,586	313,103	14,378,387

[1] Services related to marketing or supply purchasing but not included in the volumes reported for these activities.

[2] For years prior to 1950–51, see appendix table 7, FCS General Report 128. Data for prior years are not entirely comaparble due to revisions in statistical procedures in 1950–51.

[3] Preliminary.

Table 1.—Estimated gross and net volume of business of marketing, farm-supply, and related-service [1] cooperatives, and percentage of total, 1950-51 to 1963-64

Period [2]	Gross volume (includes intercooperative business)				Net volume (excludes intercooperative business)			
	Farm products	Farm supplies	Related services	Total	Farm products	Farm supplies	Related services	Total
	Percent				Percent			
1950–51	75.9	23.2	0.9	100.0	78.1	20.7	1.2	100.0
1951–52	76.3	22.8	0.9	100.0	78.4	20.4	1.2	100.0
1952–53	75.5	23.3	1.2	100.0	77.4	21.1	1.5	100.0
1953–54	75.4	20.3	1.3	100.0	77.4	20.9	1.7	100.0
1954–55	75.0	23.4	1.6	100.0	77.0	21.0	2.0	100.0
1955–56	74.9	23.4	1.7	100.0	76.8	21.0	2.2	100.0
1956–57	74.9	23.4	1.7	100.0	77.0	20.7	2.3	100.0
1957–58	75.0	23.3	1.7	100.0	77.4	20.3	2.3	100.0
1958–59	74.9	23.3	1.8	100.0	77.5	20.2	2.3	100.0
1959–60	74.7	23.4	1.9	100.0	77.5	20.0	2.5	100.0
1960–61	75.0	23.1	1.9	100.0	77.6	19.9	2.5	100.0
1961–62	75.5	22.7	1.8	100.0	78.0	19.7	2.3	100.0
1962–63	75.7	22.6	1.7	100.0	78.3	19.5	2.2	100.0
1963–64 [3]	75.6	22.8	1.6	100.0	78.1	19.7	2.2	100.0

In 1963-64, the gross volume of all farm supplies handled by cooperatives amounted to $4.4 billion, a 6-percent increase over the $4.1 billion gross in 1962-63. The net farm-supply volume of $2.8 billion accounted for 19.7 percent of the total net volume in 1963-64. This $2.8 billion net volume was a 4.7-percent increase over the $2.7 billion reported in 1962-63. Increases in net volumes of feed, fertilizer, petroleum products, and seed largely accounted for this rise.

The volume of services handled by all types of cooperatives amounted to $313 million in 1963-64, a 3-percent increase over the 1962-63 volume of $303 million. Service receipts represented 2.2 percent of the total net volume in 1963-64.

Table 2 shows the dollar volume of major commodities handled in 1963-64 and the number of cooperatives handling each commodity.

The estimated volume of farm supplies purchased by patrons from marketing, farm-supply, and related-service cooperatives in 1963-64 is shown by States and geographic regions in table 5. The East North Central and West North Central Regions combined accounted for almost 54 percent of the supplies purchased in 1963-64.

Table 5 also classifies the volume of related-service receipts by States and geographic regions. The West North Central Region ranks first with service-receipt volume amounting to more than $102 million, which is 32.6 percent of the total volume of service receipts reported by cooperatives.

In net volume of combined marketing, supply, and service receipts, California continued in first place with $1.57 billion, or 11 percent of the total net volume. Minnesota stayed in second place with $935 million net volume, or 7 percent of the total; and Iowa remained in third place with $845 million net volume, or 6 percent of the total.

Cooperatives and Memberships

The 1963-64 survey included a total of 8,847 marketing, farm-supply, and related-service cooperatives compared with 8,907 in the 1962-63 survey. Memberships in these

cooperatives totaled 7,079,500 compared with 7,218,750 in the previous survey.

Number of Cooperatives

The 8,847 marketing, farm-supply, and related-service cooperatives in the 1963-64 survey represent a decrease of 60 associations, or 0.7 percent from the previous year. Reorganizations involving mergers, consolidations, and acquisitions account in part for the decrease in the total number of cooperatives. Reorganization is generally for the purpose of improving operations and expanding services to meet the changing needs of farmer patrons.

Table 6 shows that the total of 8,847 cooperatives included 5,421 that primarily marketed farm products (marketing cooperatives), 3,266 whose major operation was handling farm production supplies (farm-supply cooperatives), and 200 related-service cooperatives.

Table 6.—Number and percentage of marketing, farm-supply, and related-service cooperatives, 1950–51 to 1963–64

Period [1]	Marketing		Farm supply		Related service		Total	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent
1950–51	6,519	64.8	3,283	32.6	262	2.6	10,064	100.0
1951–52	6,594	64.8	3,324	32.6	261	2.6	10,179	100.0
1952–53	6,501	64.2	3,378	33.4	249	2.4	10,128	100.0
1953–54	6,457	64.1	3,374	33.5	241	2.4	10,072	100.0
1954–55	6,330	63.9	3,346	33.8	227	2.3	9,903	100.0
1955–56	6,284	63.5	3,375	34.1	235	2.4	9,894	100.0
1956–57	6,284	63.5	3,373	34.1	234	2.4	9,891	100.0
1957–58	6,119	62.8	3,383	34.8	233	2.4	9,735	100.0
1958–59	6,042	62.5	3,387	35.1	229	2.4	9,658	100.0
1959–60	5,828	62.3	3,297	35.3	220	2.4	9,345	100.0
1960–61	5,727	62.5	3,222	35.2	214	2.3	9,163	100.0
1961–62	5,626	62.2	3,206	35.5	207	2.3	9,039	100.0
1962–63	5,502	61.8	3,211	36.0	194	2.2	8,907	100.0
1963–64 [2]	5,421	61.3	3,226	36.5	200	2.2	8,847	100.0

[1] For years prior to 1956–51, see appendix table 5, FCS General Report 128.
[2] Preliminary.

Comparison of 1963-64 with 1962-63 shows marketing cooperatives decreased from 61.8 to 61.3 percent of the total number of cooperatives; farm-supply cooperatives increased from 36.0 to 36.5 percent; and related-service cooperatives remained at 2.2 percent.

In analyzing the percentages in table 6, please note that in each annual survey some cooperatives are reclassified because of changes in the commodity type representing the major portion of their dollar volume.

In table 7, cooperatives are classified according to the commodity that consistently represents the largest percentage of their dollar volume of business.[3]

Minnesota continued to lead in total number of cooperatives with 1,122; Wisconsin was second with 658; and Iowa third with 567. These figures represent decreases for each of the three States.

[3] This method is discussed in FCS General Report 128, appendix, p. 68.

Organizing

A Farmer Cooperative

Farmer Cooperative Service
U. S. Department of Agriculture

FCS Circular 18 November 1956

[Upon dissolution or distribution of the assets of the association, the holders of all preferred stock shall be entitled to receive the par value of their stock, plus any dividend declared thereon and unpaid before any distribution is made on the common stock.]

In testimony whereof, we have hereunto set our hands this ———— day of ————, 19 ——.

_____ _____
_____ _____
_____

State of ————[15]
County of ———— ss.

Before me, a notary public, within and for said county and state, on this ———— day of ————, 19 ——, personally appeared ————, known to me to be one of the identical persons who executed the within and foregoing instrument, and he acknowledged to me that he had executed the same as his free and voluntary act and deed for the uses and purposes therein set forth.

Witness my hand and official seal the day and year above set forth.

_____
Notary Public

In and for the County of ————, State of ————.
My Commission expires ————.

Bylaws [16]

Article I—Purposes and Powers

The purposes for which this association is formed and the powers which it may exercise are set forth in the articles of incorporation of the association.

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[15] The required number of incorporators should acknowledge, and the acknowledgment form should conform to the requirements of the State of incorporation.

[16] The bylaws should be carefully checked against the State statute and the articles of incorporation, and should be consistent with them.

Article II—Membership

SECTION 1. *Qualifications.* Any person, firm, partnership, corporation, or association, including both landlords and tenants in share tenancies, who is a bona fide producer of agricultural products in the territory on which the association is engaged in business, and who agrees to be a patron of the association and who pays such membership fees and meets such other conditions as may be prescribed by the board of directors, may become a member of the association. This association shall issue a certificate of membership to each member which shall be in such form as may be prescribed by the board of directors but shall not be transferable.

SECTION 2. *Suspension or termination.* If, following a hearing, the board of directors shall find that a member has ceased to be an eligible member or has not, for a period of two (2) years, marketed through the association the products covered by a marketing agreement or agreements with the association or has not otherwise patronized the association or has movedv out of the territory in which the association is operating, it may suspend his rights as a member or terminate his membership. Upon termination of membership in the association, all rights and interests of such member in the association shall cease and such member shall be entitled only to payment or credit for the equitable appraised value of his property rights and interests in the association, as conclusively determined by the board of directors.[17] In determining property rights and interests all amounts allocated to each member or evidenced by certificates of any kind shall be excluded, and any such amounts shall be accounted for to members in accordance with the terms and conditions applicable thereto. No action taken hereunder shall impair the obligations or liabilities of either party under any contract with the association, which may be terminated only as provided therein.

* * * * * * *

[17] The State statute may prescribe the rights of a person whose membership is terminated, in which case this provision should be made consistent.